Supreme Court, U. S.
FILED
OCT 11 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. .....

79-602

DONALD W. AGINS and BONNIE G. AGINS,

Appellants,

vs.

CITY OF TIBURON,

Appellee.

Appeal From the Supreme Court of California.

JURISDICTIONAL STATEMENT.

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JURISDICTIONAL STATEMENT.

The Opinion Below.

The opinion of the Supreme Court of California is reported at 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25. A copy is attached as Appendix A.

Jurisdiction.

1. This is a civil action brought by Appellants against the Appellee, City of Tiburon, to recover just compensation for the alleged taking of their private property. Alternatively, Appellants sought declaratory relief invalidating, on constitutional grounds, the ordinances which accomplished the taking of their land. Appellants charged that the City, by the adoption of open space ordinances and the application of the restrictive limitations of those ordinances to their real property, has completely destroyed the value of their property

for any purpose whatsoever and has also prevented any sale, use, transfer or development of their property, or any part of it, and has thereby taken Appellants' property without due process of law and without any compensation therefor in violation of the Fifth and Fourteenth Amendments. The decision of the Supreme Court of California was that, even if Appellants could prove that the open space ordinances deprived them of all value and use, they were not entitled to just compensation. As to declaratory relief, the court below, in a single sentence denied it (without inquiring into the facts), and upheld the validity of the ordinances.

2. The judgment of the Supreme Court of California became final as to that court on May 17, 1979. A timely Petition for Rehearing was denied on May 17, 1979. The Notice of Appeal to this Court was timely filed on July 6, 1979. On July 18, 1979, Mr. Justice Stevens extended Appellants' time to docket the appeal in this Court to October 12, 1979.

3. Jurisdiction of this Court is invoked by Title 28 U.S.C. §1257(2).

Cases sustaining jurisdiction of an appeal to this Court from the judgment of a state court holding that no taking of private property has occurred and no compensation is payable to the property owner by reason of the regulatory activities of state or local government are:

Penn Central Transportation Co. v. City of New York (1978) 438 U.S. 104;

Moore v. City of East Cleveland (1977) 431 U.S. 494;

Goldblatt v. Town of Hempstead (1962) 369 U.S. 590;

Village of Euclid v. Ambler Realty Co. (1926) 272 U.S. 365;

Pennsylvania Coal Co. v. Mahon (1922) 260 U.S. 393.

Constitutional Provisions and Statutes Involved.

Fifth Amendment, United States Constitution:

". . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

"SECTION 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The full text of the City's open space ordinance, Ordinance 123 N.S., is set forth in Appendix D. Ordinance 124 N.S. rezoned Appellants' property into the open space category. It is set forth in Appendix E.

The pertinent California statutes are set forth in Appendix F.

Questions Presented.

1. Is it constitutionally permissible for a state court to hold unqualifiedly that payment of just compensation for the taking of private property for a public use, provided for by the Fifth and Fourteenth Amendments, is *never* available as a remedy to a property owner who complains of such taking done by means of a regulation which effectively deprives him of his property?

2. Is it constitutionally permissible for a state court to hold unqualifiedly that the *only* remedy available to landowners whose property has been taken by regulation effectively depriving them of their property, is to seek judicial invalidation of such regulation?

3. Is it constitutionally permissible for a state court to hold without any factual inquiry whatever as to whether the regulated property is in fact economically or physically capable of being put to uses ostensibly permitted by the regulation, that as long as the regulation *says* that some uses are permitted, such statement *ipso facto* "belies" the landowners' allegations that in fact the regulation renders the property useless and worthless?

4. Where a state statute declares that acquisition for open space by cities is a public purpose for which public funds may be expended and for which the power of eminent domain may be exercised, does it become a taking of private property for public use when a city makes privately owned land "open space" by regulation?

5. On the facts at bench, where the Appellants' property was stultified by regulation into uselessness and worthlessness, does the constitutional policy of fairness require that the ensuing economic burden be borne by the benefited public as a whole and not be disproportionately placed on Appellants?

Raising the Federal Question.

The Complaint alleged the Federal Constitutional questions here presented. It charged that the effect and result of the application of the City's open space zoning ordinances to Appellants' five acres had been

to take their property "without due process of law and without any compensation therefor in violation of the Federal and State constitutional rights of Plaintiffs." (Complaint, Paragraph IX.) These same Federal Constitutional questions were presented at all stages of the appeal.

Statement of the Facts of the Case.

This appeal arises from the California Supreme Court's affirmance of the dismissal of Appellants' inverse condemnation and declaratory relief action. Thus, the substantive facts come from Appellants' Complaint, which for purposes of review are taken as true and are liberally construed under both Federal and California law.[1]

Appellants own five acres of undeveloped land within the City of Tiburon which they purchased for residential development uses and which, except for the restrictive ordinances adopted by the City, would have been available and adaptable for such residential uses. The five acres are classified as "ridgelands" and possess a magnificent view of San Francisco Bay and the surrounding areas.

The City of Tiburon is in Marin County, California, on the north edge of San Francisco Bay. It is one of the smaller cities of California, containing only 1,676 acres. Its population is 6,209 according to the 1970 census. The City's favorable climate, aquatic fa-

[1]Under California law facts alleged in the Complaint are treated as being true for the purpose of determining the sufficiency of those allegations. *Commercial Standard Ins. Co. v. Bank of America* (1976), 57 Cal.App.3d 241, 129 Cal.Rptr. 91. Zoning ordinances and City actions are a proper subject of judicial notice. *City of Los Angeles v. Wolfe* (1971), 6 Cal.3d 326, 331, 99 Cal.Rptr. 21, 491 P.2d 813; California Evidence Code §452(b).

cilities, proximity to the San Francisco Metropolitan area and sweeping view of San Francisco Bay make it one of the most desirable places to live within California. It has one of the highest land values per acre of the suburban areas of the State. Of the undeveloped acreage within the City, Appellants' five acres are among the most desirable and contain among the best views.

In 1959, California enacted Sections 6950-6954 of the Government Code which specifically authorize the acquisition of private property by local government for open space purposes. These open space purposes are declared to be public uses. The exercise of the eminent domain power to acquire property for open space is specifically authorized. The text of Sections 6950-6954 are set forth in Appendix F.

Commencing in 1967, the California Legislature enacted provisions in the Government Code giving authority for cities and counties to adopt General Plans for land use and setting forth the scope of such General Plans. In 1970, these provisions were amended to provide that General Plans must include an Open Space Element to be in accordance with the Local Open Space Plan provisions of the Government Code.[2] In 1972, the Legislature adopted Government Code Section 65302.2, making mandatory the adoption of General Plans with Open Space Elements.

Also in 1970, California enacted provisions in its Government Code requiring every city to adopt an open space zoning ordinance.[3]

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[2]The pertinent provisions of law are contained in Sections 65560-65567, the text of which are contained in Appendix F.

[3]The Open Space Zoning requirements are set forth in Sections 65910, 65911 and 65912, and included in Appendix F.

In early 1972, the City took action to preserve and maintain in open space a substantial portion of the City's then undeveloped acreage. In January, 1972, it hired Dean Witter & Co., Inc., to prepare and present a Financing Plan for open space acquisition. This Financing Plan was prepared in early July, 1972, and approved by the City at that time. It described and itemized various properties within the City, the acquisition by the City of which for open space purposes would be financed by a City bond issue. Included within the property to be acquired from the funds obtained in this bond issue were the Agins' five acres. The Financing Plan was accepted by the City, and the City sold the bonds and received $1,250,000 to purchase parcels of ridgeland for open space purposes. The City then purchased, for open space purposes, the property adjoining the Agins' land. The City, however, refused to allocate any part of the bond proceeds for the acquisition of the Agins' property.

Also in January, 1972, the City undertook to prepare its Open Space Plan by hiring Williams & Mocine to prepare it. The Plan was completed and adopted by the City in October, 1972. This Open Space Plan identified the Agins' property as "indispensable to and necessary for the open space program." It provided that the Agins' property be "forthwith purchased" for cash in accordance with the Dean Witter Financing Plan.

In furtherance of the recommendations of the firms that had prepared the Financing Plan and the Open Space Plan, the City, on October 25 and 26, 1973, adopted Resolutions authorizing condemnation for open space purposes of the Agins' five acres and of twenty-five adjoining acres. Six weeks later—on December

4, 1973—the City filed a Complaint in eminent domain against Appellants to acquire their five acres for public use, namely, for open space purposes.

In the year that followed, the City changed its mind regarding the method of keeping the Agins' property in open space. In November, 1974 the City filed a Notice of Abandonment of the eminent domain action, as the result of which the case was dismissed in May of 1975. Since that time the City has relied upon its zoning ordinances, 123 N.S. and 124 N.S. to accomplish its aims and objectives of preserving the Agins' five acres in open space.

On June 28, 1973, the City adopted Ordinance 123 N.S. by which it created special restrictive zoning for open space purposes. (Appendix D.) According to Ordinance 123 N.S. a zone classification of RPD-1, meaning "Residential Planned Development and Open Space Zone", is created. The only uses authorized are (1) one-family dwellings; (2) open space uses; and (3) accessory buildings and accessory uses. Density of buildings is limited to not less than one unit per five acres nor more than one unit per acre. Also on June 28, 1973 the City adopted the companion Ordinance 124 N.S. by which particular parcels of undeveloped land, including Appellants' five acres, were placed into this RPD-1 Zone. (Appendix E.)

Appellants alleged in their Complaint that the restrictions upon their property to the RPD-1 uses deprived them of all use and all value of their property. In effect, Appellants claim that, because of the zoning the property lost all its economic use and value for either one-family dwellings, for open space uses, or for accessory uses. The California Supreme Court, in ruling upon the allegations of the first cause of action

in inverse condemnation, treated those allegations of the Complaint as being true—*i.e.*, that no economic use or value existed for the property under that zoning.[4]

The five acres owned by Appellants were never formally acquired by the City. Rather, Appellants continue as the ostensible record owners of the property, but because of the restrictions of Ordinance 123 N.S. Appellants are unable to make any use whatsoever of their property. These actions by the City have completely destroyed the value of their property for any purpose or use by them whatsoever and have prevented any sale, use, transfer or development of the property or any part of it (except, presumably, a transfer by gift to the City for open space purposes).

The Agins' Complaint alleged two causes of action. The first was that the result of the City's actions has been the taking of their property without the payment of just compensation in violation of their Federal and State Constitutional rights and that they should have judgment for their just compensation. The second was for a declaratory judgment that the Open Space Zoning Ordinance was invalid because confiscatory and in excess of the City's authority.

The City demurred to Appellants' Complaint. The Trial Court sustained the demurrer without leave to amend as to the cause of action for inverse condemnation and sustained the demurrer on the cause of action for declaratory relief with leave to amend. Appellants

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[4]However, when the California Supreme Court considered the validity of the zoning under the second cause of action for declaratory relief, it stated, in contradiction of the allegations of the Complaint, that Appellants could make some economic use of their property and that it would have some value under this zoning. The Court ignored the allegation that, *as applied*, the Ordinance was confiscatory, and looked instead to the face of the Ordinance.

declined to amend their Complaint and the Trial Court thereupon entered a Judgment of Dismissal of the action on May 5, 1976. (Appendix B.)

Appellants then appealed to the California Court of Appeal and it, on April 24, 1978, reversed the Judgment of Dismissal of the inverse condemnation cause of action and affirmed the Judgment of Dismissal of the declaratory relief cause of action. The City then petitioned the California Supreme Court for a hearing, which was granted. The California Supreme Court, by its opinion printed in Appendix A, affirmed the dismissal by the Trial Court of both the first and second causes of action, holding that Appellants were not entitled to relief in either inverse condemnation or declaratory relief. Justice Clark dissented. With this action the Trial Court Judgment of Dismissal became final as to the California Courts. This Appeal followed.

The Issues Presented Here Are Substantial and of Widespread Impact.[5]

Introduction.

The facts are clear that the City of Tiburon decided to try its power of eminent domain like a new shoe,

[5]While the national aspects of the issues here presented are substantial, and are dealt with *infra*, it also warrants noting that the problem is particularly acute in California. In addition to the case at bench, two more California cases are expected to reach this Court at about the time the instant appeal is docketed. They are: *Furey v. City of Sacramento* (1979) .... Cal.3d ...., 157 Cal.Rptr. 684, ... P.2d ...., and *San Diego Gas & Electric Co. v. City of San Diego* (1978) 146 Cal. Rptr. 103 (summarily vacated by the California Supreme Court, and remanded to the Court of Appeal which on remand disposed of the cause adversely to the landowner, by unpublished opinion ignoring the factual findings of the Trial Court that San Diego's "regulations" totally deprived the land of use and value, and in turn remanded back to the Trial Court for a pointless retrial of the same facts).

and dissatisfied with the evident fit, accomplished the same purpose of converting the Appellants' land into public parkland (*i.e.*, "open space"[6]) through the subterfuge of "regulating" it into functional and economic oblivion. While the legal issues that form the background of this controversy are important and widespread—and for that reason amply deserve treatment by this Court—it is also important to emphasize that Appellants seek here the redress of rank injustice. Not only did they suffer effective confiscation of their property, but when they complained, they were denied so much as a day in court.

Whether viewed as a vehicle for settlement of sorely disarrayed law and national constitutional policies, or as implementation of the time-honored judicial function of doing justice, this case commends itself to review on the merits by this Court.

There Is a Vacuum of Legal Principle in the Field of Inverse Condemnation, That Desperately Needs Attention by This Court.

The problem of confiscatory land use regulation (the "taking issue" as it is sometimes called) is one of the most widespread, difficult, contentious, and growing areas of constitutional litigation in the country. The nation's travails in this area are fueled by two important factors:

[6]The California Legislature left no doubt (Cal. Government Code §51097 and §§6950-6954) that open space is a public use for which the power of eminent domain may be exercised. Nonetheless, here the city effectively acquired five acres of open space (and the benefits flowing from it) without the concomitant obligation to pay just compensation as required by the Constitution. This is indeed the "shorter cut" than permitted by the Constitution, that was deplored by Mr. Justice Holmes in *Pennsylvania Coal Co. v. Mahon* (1922), 260 U.S. 393, 416.

First, past decisions of this Court leave no doubt that each case calling for drawing of the line of demarcation between permissible regulation and unconstitutional taking requiring payment of just compensation, must be decided on its own facts. See e.g., *Penn Central Transportation Co. v. City of New York, supra,* at 438 U.S., 123-124, *Goldblatt v. Hempstead, supra,* 594, *United States v. Central Eureka Mining Co.* (1958), 357 U.S. 155. While this salutary principle of flexibility has its manifest virtues, it also carries with it the dangers of lack of predictability and of powerful incentives to further litigation, as both sides to this durable controversy increasingly press their causes upon lower court judges in an effort to identify and reduce to precedent those infinitely variable factual situations that are likely to further their positions.[7]

In short, there comes a point where even bad law is better than uncertain law that only serves to fuel acrimonious disputes, imposes needless burdens on the courts' and parties' resources, and in the end produces no reliable precedent likely to forestall more such disputes. Appellants therefore respectfully urge that the Court now devote

[7]Appellants respectfully urge the Court to reflect on the predicament facing even the most skilled lawyers, when they are called upon to explain to their clients on the basis of this Court's most recent expression (*i.e., Penn Central, supra,* 438 U.S. at 123-124), that there is ultimately no reliable way of predicting the probable outcome of this ruinously costly and protracted litigation, without pressing the cause all the way to this Court for the purpose of engaging in ". . . essentially, *ad hoc,* factual inquiries . . ." that point to no predictable outcome, but only serve to further ". . . identif[y] several factors that have peculiar significance" (438 U.S. at 124).

its attention to a balancing process. Having been told by this Court that inverse condemnation controversies are factually flexible, the nation now badly needs similar judicial guidance as to where flexibility ends and guiding precedent begins.

Second, the mechanisms of land use regulation have undergone a revolutionary change in the last decade. The notion of yore that construction of improvements on land need only be preceded by compliance with zoning ordinances and building codes, and issuance of a building permit, has by now joined such venerable images as the hand-cranked automobile. It would impermissibly swell this brief to provide even a thumbnail sketch of the details of today's regulations. Suffice it to say that in some portions of California as many as a dozen permits may be required before a landowner may construct a single family dwelling for his own use. In the case of larger scale projects, the regulatory travails become mind-boggling, with literally scores of permits from scores of agencies required, all resulting in an economic nightmare that at times not even the nation's wealthiest enterprises can afford.[8]

[8]It is undoubtedly subject to judicial notice, in light of these events' enormous notoriety and (in one instance) public comments by the President of the United States, that such giants as Sohio, Dow Chemical, and Walt Disney were forced to abandon their plans for major projects in California, not because these projects were ever substantively adjudged to be illegal or environmentally "bad", but simply because not even these enterprises, for all of their Croesus-like resources, could bear the economic burdens of interminable regulatory maneuverings that after the expenditure of millions of dollars and years of effort, produced no approvals, and only promised further consumption of time and money in pursuit of increasingly hydra-headed regulatory demands, with no prospect of resolution in sight.

Another vitally important element of the revolutionary change in land use regulation is the recent explosive balkanization of regulatory authority. No longer is one confronted with obtaining approval from a readily identifiable local regulatory entity. The historical dominance of this area by towns and counties has been diluted and overlaid by a layer cake of agencies that range all the way from state and regional bodies (such as the California Coastal Commission), all the way to bi-state entities (such as the Tahoe Regional Planning Agency), to federal agencies. Along with these novel regulatory super-agencies, the land use regulatory process has also been honeycombed from the bottom, as it were, by a multitude of mini-authorities such as local wetlands and historical conservation districts, water and sewage districts, all the way down to something called a "neighborhood" (see Revised Charter of the City and County of Honolulu, 1973, Art. XIII, Sec. 13-101 et seq.). Finally, as if all that were not enough, it now seems clear that the people of a community, can simply take matters into their own hands, and by initiative or referendum vote to change the zoning of even a single lot in their community. See *City of East Lake v. Forest City Enterprises* (1976), 426 U.S. 668.

Appellants hasten to point out that it is not their purpose to debate here the wisdom of such arrangements; their point rather is that governmental arrangements have necessary *constitutional* consequences, and legal approaches evolved in an earlier day frequently prove ineffective to protect the constitutional rights, as those rights come under attack by techniques un-

dreamed of when the basic principles of pertinent law were laid down. In short, just as this Court has demonstrated the need to recognize the changing social conditions in approving novel regulations (see *Village of Euclid v. Ambler Realty Co., supra*, at 272 U.S. 387) so too, there is a correlative need to recognize that eventually the new regulations impact on society in ways unanticipated in the past.

The principal problem with current regulatory reality is that all too often the multitude of big and little Caesars who do the regulating, their good intentions fueled by perceived (or at least professed) nobility of their socio-ideological goals (such as protection of the environment, urban aesthetics, historical preservation, growth control, etc.), pour out what two knowledgeable commentators have aptly called "a synergistic nightmare, a paralyzing mishmash" and a "bubbling cacophony of multitudinous edicts"[9] that often stultify literally all economically rational uses of stretches of land. The specter of American landowners being told to pay their taxes while simultaneously being denied any rational use of their property that would justify the values on which they are being taxed is not an exaggeration; it is a growing reality in many parts of the country.

The blunt fact is that there are simply *no* readily ascertainable and applicable legal criteria whereby one can gauge when all this furious regulatory activity trenches on constitutionally protected rights. An Ameri-

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[9]Hagman v. Misczynski, *The Quiet Federalization of Land Use Controls: Disquietude in the Land Markets*, The Real Estate Appraiser, Sept.-Oct. 1974, p. 5, at p. 7. Please note that Professor Hagman is a widely acknowledged national authority on land use law, whose casebooks and hornbooks on this subject are used in leading law schools throughout the country.

can citizen in one state finds that his supposed *federal* constitutional rights bear no resemblance to his fellows' rights in other states.[10]

Beyond that, if the public use for which the acquisition of private property is contemplated is a passive one (*e.g.*, open space), it quickly becomes apparent to callous governmental entities that the taking can be effected without parting with a thin dime if economically reasonable use of the desired land is prohibited[11] (see *e.g., Peacock v. County of Sacramento* (1969), 271 Cal.App.2d 845, 77 Cal.Rptr. 391, where all use of the subject property—save growing of grass—was forbidden while *ad valorem* taxes were increased every year; *City of Austin v. Teague*, (1978 Tex.)

[10]For example, New Jersey holds that a one-year stultification of land use is in itself a taking of a one-year option (see *Lonarch Corp. v. City of Englewood* (1968, N.J.), 237 A.2d 81), whereas California sees nothing wrong with as much as a fire-year "moratorium" (see *State v. Superior Court (Veta)* (1974), 12 Cal.3d 237, 524 P.2d 1281, 115 Cal.Rptr. 497). Under similar circumstances New York law suggests about three years as the permissible limit (*St. Aubin v. Biggame* (1976, App. Div.) 381 N.Y.S.2d 533).

Wisconsin takes the position that zoning unproductive land as agricultural is unconstitutional (*Kmiec v. Town of Spider Lake* (1973, Wis.) 211 N.W.2d 471), while California sees nothing wrong with zoning "agricultural" barren desert land lying in the mouth of the Tijuana River (*Helix Corp. v. City of San Diego* (1978), 82 Cal.App.3d 932, 147 Cal.Rptr. 683).

[11]Much printer's ink has been expended debating the extent, if any, to which physical invasion is required to work a constitutional taking. In the context of this appeal, such disputations are wordplay. If the City of Tiburon were to want to build a road across the Appellants' land, it would eventually have to enter and do so. But if the City—as is the case here—only wants to see to it that the subject property remains untouched (*i.e.*, open space), it can accomplish its purpose—as was done here—by forbidding all rational use, and thereby effectively conscripting the Appellants as involuntary public open space keepers who can be made to pay for this "privilege" by having the property which they nominally "own" taxed.

570 S.W.2d 389, where all use of private land was frustrated, while local environmentalists went through the motions of seeking (somebody else's) funds to acquire it; and *Arastra Limited Partnership v. City of Palo Alto* (1975, N.D. Cal.), 401 F.Supp. 962, where after deciding that it wanted to acquire the subject property for a park, the city set out to do so without compensation, by means of imposing a complex scheme of "regulations" which in fact made the property unusable[12]).

Beyond these problems lies an even darker side of government. Environmental or growth control regulations can be so applied as to increase the cost of available land dramatically, and thereby exclude any realistic chance of the disadvantaged, or even the lower-middle class, from coming into the tony community that—*mirabile ductu!*—is now able to exclude the disfavored population without so much as a hint of racial or socioeconomic epithets, or the bother of having to withstand the scrutiny required by *Village of Arlington Heights v. Metro Housing Dev. Corp.* (1977), 429 U.S. 252. On the contrary, the doers of such deeds are able to present themselves in public as noble and civic-minded protectors of the environment and of community values[13] (see *Ybarra v. Los Altos Hills* (1974, 9th Cir.), 503 F.2d 250, and compare *Appeal of Kit-Mar Builders, Inc.* (1970) 439 Pa. 466, 268 A.2d 765).

[12]Following that decision, the City of Palo Alto settled the case for some $4,500,000, whereupon the opinion of the District Court was vacated by stipulation. 417 F.Supp. 1125.

[13]Of course, in this day and age, appearances have to be observed, particularly in legendary Marin County which adroitly manages to be probably the most exclusive county in California (if not the country) while simultaneously priding itself on its liberal image. For a bit of ingenious tokenism, see *Winkelman v. City of Tiburon* (1973), 32 Cal.App.3d 834, 108 Cal.Rptr. 415.

Even if exclusion is not intended, it results anyway by the inexorable working of economics; scarcity-caused high cost of housing in California is notorious and requires no elaboration.

In short, land use regulation, like any other species of governmental regulation can be, and is being, abused. Its victims, whether the disadvantaged segment of the population effectively excluded from a fair crack of pursuing the vaunted American dream, or persons such as the Appellants who have been singled out for effective confiscation of their lawfully accumulated property, are entitled to the protection of their constitutional rights, and here is where the problem comes in.

There is abroad an intellectual vacuum of principle. This Court has entertained cases of this type so infrequently, and disposed of them with such paucity of doctrinal principle applicable to diverse factual situations,[14] as to provide the lower courts around the country with precious little reliable precedential guid-

[14]Appellants would be inhibited from making so bold a statement were it not for the fact that in *Penn Central Transportation Co. v. City of New York, supra,* at 438 U.S. 124, this Court was quite explicit in pointing out its own inability to formulate a reliable guide to the delineation of the boundary separating permissible regulation from regulatory inverse condemnation, and its tendency to make *ad hoc* inquiries into the facts of each case. Unfortunately, in the 57 years that have elapsed since the seminal decision in *Pennsylvania Coal Co. v. Mahon, supra,* this Court has considered only a handful of such cases on the merits. See *United States v. Central Eureka Mining Co.* (1958), 357 U.S. 155; *Goldblatt v. Hempstead, supra; Penn Central Transportation Co. v. City of New York, supra,* and *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency* (1979) .... U.S. .... [59 L.Ed.2d 401]. The factual and legal contexts of these decisions are so diverse that, as a practical matter, one finds it impossible to extract from them any reliable legal doctrine of sufficient substance to guide landowners or governmental entities in their dealings with one another.

ance. The upshot is that whether suffering from lack of clear constitutional principle, or secure in their belief that this Court is not likely to review the matter on the merits, courts around the country have in recent years structured a bewildering intellectual smorgasbord of liability criteria and remedies (or, as in the case at bench, non-remedies), whose result is that no one can predict the outcome of inverse condemnation litigation, nor indeed say what one's remedy may be.

Appellants, therefore, respectfully urge that intervention by this Court is badly needed, not only to relieve them of their confiscatory plight, but also to provide a desperately needed elucidation of principle that will permit disposition of similar controversies, without the exorbitant cost, delay, uncertainty and injustice that are familiar by-products of the current admittedly *ad hoc,* case-by-case approach to the problem of confiscatory regulation that is bedeviling the country.

The Law Governing Remedies Available to an American Property Owner Whose Land Has Been Unlawfully Taken Is in a State of Chaos.

Since the case at bench presents the issue of appropriate remedy as well as that of uncompensated regulatory taking, Appellants urge that the problem of remedies alone warrants intervention by this Court. This is so because as one surveys the record of state courts responding to aggrieved landowners' Fourteenth Amendment challenges to confiscatory land use regulation, the pattern is chaotic.

Thus, Ohio takes the position that a landowner's remedy is inverse condemnation damages (*Village of Willoughby Hills v. Corrigan* (1972) 29 Ohio St. 39, 278 N.E.2d 658, 665, *cert. den. sub nom. Chongris*

v. Corrigan (1972) 409 U.S. 919, Mr. Justice Douglas dissenting).[15] So does Nebraska (*State v. Mayhew Products Corp.* (1979) 281 N.W.2d 783, 786). In contrast, California and Arizona (*Davis v. Pima County* (1978, Ariz. App.), 590 P.2d 459, *cert. den.* (1979) .....U.S. ..... [61 L.Ed.2d 312]) take the diametrically opposite position, deny damages, and purport to allow invalidation as the sole remedy.

Florida at first blush purports to follow the California-Arizona approach (*Mailman Dev. Corp. v. Hollywood* (1973, Fla.App.), 286 So.2d 614), but does not necessarily do so (see *Askew v. Gables-by-the-Sea* (1976, Fla.App.) 333 So.2d 56, *cert. den.* (1977, Fla.) 345 So.2d 420). More recent Florida developments thicken the fog: In *Moviematic Industries, Inc. v. Dade County* (1977, Fla.App.) 349 So.2d 667, 672, the court at first hewed to the *Mailman* approach of invalidation as remedy, but concluded by suggesting that the monetary inverse condemnation remedy remains available under some (but alas, unspecified) circumstances.[16]

Texas takes yet another approach and allows *both* invalidation and damages for interim losses suffered (*City of Austin v. Teague, supra*). However, Texas

[15]The dissenting observations of Mr. Justice Douglas are called to the Court's attention; particularly his perceptive views on ostensibly regulatory takings for scenic easements (409 U.S. at 920), as well as his recognition of the need to structure appropriate remedies (409 U.S. at 921).

[16]Florida law thus reaches the level of an unabashed Catch-22. An aggrieved Florida landowner must show that a regulation is confiscatory; *i.e.*, that his property is now worthless. But if he is limited to certiorari as his remedy (which is what *Mailman* suggests) he cannot make such a showing, because certiorari is limited to judicial review of the administrative record, and in administrative zoning proceedings there is no opportunity to put on expert appraisal testimony going to land values.

makes the owner's out-of-pocket losses the standard of recovery, rather than the customary rental value of the property temporarily taken. Similarly, Washington permits both remedies (*Brazil v. City of Auburn* (1979, Wash.App.), 598 P.2d 1).

New York, not unlike Florida, presents a thoroughly bewildering picture. It prefers the invalidation remedy (*Jensen v. City of New York* (1977), 42 N.Y.2d 1079, 369 N.E.2d 1179), but points out that where the impact of the excessive regulation is irreversible, the monetary inverse condemnation remedy is available (see *Fred. F. French Investing Co. v. City of New York* (1976), 39 N.Y.2d 587, 350 N.E.2d 381). In that situation, New York provides for temporary rental as the measure of compensation (see *Keystone Associates v. State* (1975, Ct.Cl.), 371 N.Y.S.2d 814, rev'd. (1976, App.Div.), 389 N.Y.S.2d 895, rev'd. and remanded (1978), 45 N.Y.2d 894, 383 N.E.2d 560). The bewildering part is that even in some cases where the aggrieved landowner demonstrably suffered irreversible damage, the New York Court of Appeal refused to award compensation (See *Charles v. Diamond* (1976, App.Div.), 366 N.Y.S.2d 921, rev'd (1977) 41 N.Y.2d 378, 369 N.E.2d 1295).

Within the last few months this already murky picture was further clouded when Kansas opted for inverse condemnation damages as the proper constitutional remedy (see *Ventures in Property 1 v. City of Wichita* (1979, Kan.), 594 P.2d 671, and note that its holding and theory are directly contrary to *Jensen v. City of New York, supra*). Similarly, Colorado rejected invalidation as an unqualified remedy, astutely noting that it is useless in cases of cumulative or successive administrative acts, and is incapable of providing a forum

in which governmental bad faith may be tried. *Hermanson v. Board of County Com'rs., etc.* (1979, Colo. App.), 595 P.2d 694, 695 (cert. den.).

Space limitations forbid further analysis of this kind. Suffice it to say that to an American landowner seeking relief for violation of his *federal* constitutionally protected property rights, the law provides only the prospects of haphazard and totally *ad hoc* adjudication that at best varies with location. There is no other provision of the federal Constitution that has been permitted to drift in this fashion, to be so whimsically construed by diverse local tribunals.

This remedial aspect of the case at bench amply warrants consideration on the merits by this Court, so that some national criteria for remedial enforcement of the Fifth Amendment's just compensation clause can be established.

The Decision Below Destabilizes the Law by Disregarding This Court's Holding on Federal Constitutional Grounds That an Aggrieved Property Owner's Primary Remedy for Uncompensated Taking Is Monetary.

Little need be added to the above heading; this Court has addressed the issue several times with results that leave little room for argument. The leading decision is *Hurley v. Kincaid* (1932), 285 U.S. 95, which reversed the lower courts' decisions granting injunctive relief against a threatened uncompensated taking, and relegated the landowner to his monetary inverse condemnation remedy. The rationale for this decision was two-fold.

First, that the illegality inherent in an uncompensated taking of private property is the failure to

compensate, and this affords no basis for specific relief if the compensation may be procured in an action at law (285 U.S. at 104). In other words, where the governmental entity embarks on a course of action that pursues legitimate public objectives, but is flawed by an illegality (*i.e.*, failure to compensate) the law will undo the illegality and provide compensation, rather than vitiate the whole governmental purpose and public policy by invalidating the entire enactment.

Second, in this Court's words:

> "Even where the remedy at law is less clear and adequate, where large public interests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental ends, a court of equity acts with caution and only upon clear showings that its intervention is necessary in order to prevent an irreparable injury." (285 U.S. at 104, fn. 3).

For more recent applications of this principle, see *Dugan v. Rank* (1963), 372 U.S. 609, and its companion case, *Fresno v. California* (1963), 372 U.S. 627, both holding that inverse condemnation damages, and not invalidation or injunction, constitute the proper constitutional remedy. Please note *Dugan's* reiteration of the familiar principle that to invoke this rule the unlawful taking need not be physical (372 U.S. at 625); accord, *Penn Central Transportation Co. v. City of New York, supra*, at 438 U.S. 123, fn 25).

More recently, in the *Regional Rail Reorganization Act Cases* (1974), 419 U.S. 102, this Court had another occasion to speak to the issue of remedies, with

results that leave precious little room for debate. There, the lower court invalidated the Act because it worked an uncompensated taking. This Court reversed, holding that as long as access to compensation remained (via an inverse condemnation suit in the Court of Claims under the Tucker Act[17]) invalidation was improper.

Nor is that all. This Court also addressed the issue of remedies specifically in the context of California law in *United States v. Gerlach Live Stock Co.* (1950), 339 U.S. 725, 752-753, holding that where California destroyed certain private water rights by enactment of a police power provision in its Constitution (dealing with water conservation—Cal. Const., Art. XIV, §3), such rights remained *compensable*, albeit not enforceable by injunction or other specified relief.

In sum, this Court's expressions are quite clear that the Constitution means just what it says; that where private property is unlawfully taken for public use without just compensation, that missing ingredient will be supplied by the courts whose prerogative it is to do so (*Monongahela Nav. Co. v. U.S.* (1892), 148 U.S. 312, 327).

The California Supreme Court's decision below improvidently upsets the time-honored division of responsibility between the legislature and the judiciary, whereby legislatures fix regulatory and acquisitory policy and the courts insure compliance with the constitutional mandate that just compensation be paid upon taking of private property. The decision below sets up the courts as some sort of super board of zoning appeals

[17]This is *a fortiori* consistent with California law. There, access to the courts to seek just compensation exists directly under the state constitution (Cal. Const., Art. I, §19). See *Rose v. State* (1942), 19 Cal.2d 713, 720, 123 P.2d 505.

that gets to review and strike down those land use regulations that prove to be expensive (*i.e.*, those that work a taking of a property right). Wholly aside from the disharmony within the law that this approach creates, it is simply bad public policy that threatens to embroil the already much burdened judiciary in often political, complex local land use controversies on an ongoing basis, in a way reminiscent of the old substantive due process days.

If the Decision Below Is Permitted to Harden Into Precedent, the Necessary Consequence Will Be a Massive Shifting of Local Land Use Control Controversies Into the Federal Courts, Thereby Needlessly Enlarging Their Caseloads.

A policy consideration extremely important to the federal judiciary arises ineluctably from the juxtaposition of the opinion below and this Court's decision in *Lake Country Estates v. Tahoe Regional Planning Agency, supra,* .... U.S..... [59 L.Ed.2d 401].

For reasons touched on elsewhere in this brief, today specific remedies do not provide aggrieved landowners with effective remedies. And so, such owners experience a powerful incentive to seek monetary relief. When they act on that incentive, they discover a closed state courthouse door (*i.e.*, the ruling at bench which flatly denies them the right to seek just compensation), but simultaneously they are told by this Court in *Lake Country Estates* as well as by the lower federal courts in numerous other cases,[18] that their plea for mone-

[18]In recent years, it has become quite clear that in the area of property rights, just as in the case of any other fundamental rights protected by the Constitution (see *Lynch v. Household Finance Co.* (1972), 405 U.S. 538, 552), the federal courts,

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tary relief in the form of constitutionally promised just compensation will be entertained. Under these circumstances it is but rhetorical to ask what should a rational aggrieved landowner represented by counsel of minimal competence do. Obviously, sue in the federal courts.

While this may well have been unintended, what the California Supreme Court accomplished with a stroke of its pen in the decision below, is effectively to transfer into the federal courts *all* of the most difficult *local* land use controversies. While "taking issue" controversies are no doubt difficult (and the

faithful to their historical role as guardian of the federal Constitution, will entertain cases of regulatory impairments of property rights so severe as to deprive landowners of reasonable use of their property, thereby giving rise to constructive takings. In addition to this Court's decision in *Lake Country Estates v. Tahoe Regional Planning Agency, supra,* see *Gordon v. City of Warren* (1978, 6th Cir.) 579 F.2d 386, *Rodgers v. Tolson* (1978, 4th Cir.) 582 F.2d 315, *Cordeco Dev. Corp. v. Santiago Vazquez* (1976, 1st Cir.) 539 F.2d 258, *Barbaccia v. County of Santa Clara* (1978, N.D. Cal.) 451 F.Supp. 260, *Sixth Camden Corp. v. Township of Evesham* (1976, D.N.J.), 420 F.Supp. 709, *Sanfilipo v. County of Santa Cruz* (1976, N.D. Cal.), 415 F.Supp. 1340, *Dahl v. City of Palo Alto* (1974, N.D. Cal.), 372 F.Supp. 647, *Rasmussen v. City of Lake Forest* (1975, N.D. Ill.), 404 F.Supp. 148, *Immobilaria Borinquen v. Garcia Santiago* (1969, D.P.R.), 295 F.Supp. 203, *Hotel Coamo Springs v. Hernandez Colon* (1976, D.P.R.), 426 F.Supp. 664. The foregoing cases are but a sampling; no attempt has been made in this limited space to canvass the pertinent federal law. It is simply too late in the day to question the federal courts' jurisdictional basis for entertaining cases in which it is alleged that state or local officials have abused the power of eminent domain by taking private property without just compensation. See *Mosher v. Phoenix* (1932) 287 U.S. 29.

Moreover, the recent holdings of this Court expanding the availability of Civil Rights Act remedies to property rights (*Lynch v. Household Finance Co., supra*) and against local governmental entities (*Monell v. Department of Social Services* (1978), 436 U.S. 658) make it a virtual certainty that landowners confronted with a barred state courthouse door, will take their cases seeking just compensation to the federal courts.

resulting valuation evidentiary problems of legendary tedium and length), and while one can understand how California courts may be altogether unrepentant as they watch would-be land use litigants streaming from their courthouse into the federal one, this is a matter of considerable policy importance to the overburdened federal judiciary. Whether such shift of these litigational burdens from the state to the federal courts is good or bad policy is for this Court to decide; it is a decision that should be quite consciously made and not be forced on the federal judiciary by the stroke of a state court's pen. Wholly aside from their own interest which impels them to urge reversal, Appellants respectfully urge that in the long run, a decision in their favor (*i.e.*, one requiring state courts to enforce the federal constitutional just compensation remedy) will have the wholesome side effect of preventing a substantial and needless increase in the litigational burdens imposed on the federal courts.

Under the Ruling Below, There Is No Practical Remedy Available to Aggrieved California Landowners Who Are Thus Denied Not Only Just Compensation but Due Process of Law as Well.

While the opinion below pays lip service to the cause of non-monetary remedies said to be available to the inverse condemnee/landowner (*i.e.*, administrative mandamus and declaratory relief), *in fact* no such remedies exist.

Taking these asserted remedies in reverse order, the opinion below itself exposes the inefficacy of declaratory relief. It is permitted only as a means of attacking the *facial* invalidity of the ordinance. Thus, at bench the challenged ordinance *says* that Agins may build

between one and five dwellings on his land (maybe), and on that basis he was not even afforded a day in court to show that *as applied* to him, he could not build anything economically viable, or put the subject property to any other economically rational uses. This is directly contrary to *Nectow v. Cambridge* (1928), 277 U.S. 183, holding such determinations to turn on the facts of the specific case; accord, *Portsmouth Harbor, etc. Co. v. U.S.* (1922), 260 U.S. 326.

As for administrative mandamus on present California law it is totally ineffective.[19] This is so because in *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 109 Cal.Rptr. 799, 514 P.2d 111, the California Supreme Court held that "the law" which is to be tested in mandamus proceedings is not the law (or administrative act) that initially aggrieved the plaintiff-landowner and caused the litigation, but rather "the law" (or administrative act) as it happens to be at any time the defendant entity chooses to change it before a final judicial determination.[20]

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[19]It is of utmost significance that there have been no reported California cases invalidating land use regulations on grounds of confiscation since *Kissinger v. City of Los Angeles* (1958), 161 Cal.App.2d 454, a case more in the nature of proscribed pre-condemnation value depression than regulation. In the quarter-century that elapsed since *Kissinger,* California courts have shown no inclination to grant such relief, even if they have given it much lip service while turning away plaintiffs suing in inverse condemnation. See *e.g., HFH, Ltd. v. Superior Court* (1975), 15 Cal.3d 508, 542 P.2d 237, 125 Cal.Rptr. 365, *cert. den.* 425 U.S. 904, *State v. Superior Court (Veta)* (1974), 12 Cal.3d 237, 524 P.2d 1281, 115 Cal.Rptr. 497.

[20]The abusive potential of this aspect of California law becomes apparent from the following advice given by James Longtin, City Attorney for the City of Thousand Oaks, California, instructing his fellow municipal lawyers:

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Beyond that, California governmental entities have at their disposal a weapon that renders them immune to non-monetary relief: simple inaction. How does one get an "administrative" adjudication of a *lack* of administrative action? That this is no conjectural fear may be seen from *Cordeco Dev. Corp. v. Vazquez* (1972, D.P.R.), 354 F.Supp. 1355, aff'd. (1976, 1st Cir.), 539 F.2d 258, where a landowner's application for a required permit was simply ignored, and eventually a useless, sham permit was issued. In that connection, please bear in mind that the new land use regulations often profess to be environmentally-minded and purport to seek to preserve land in its original "open space" condition. Thus, governmental inaction becomes a potent weapon with which to force the owner to do nothing with his land,

Thus, practically speaking, a California landowner can get no effective relief through administrative mandamus proceedings. At most, if he files a meritorious suit, his adversary can simply change its position, and in Longtin's words, quoted *supra,* "everybody starts over again." That—it is submitted—is no remedy; it is rather an illusion that serves to deny to the victims of unconstitutional regulation due process of law.

"If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent Supreme Court case of *Selby v. City of San Buenaventura,* 10 C.3d 110, appears to allow the City to change the regulation in question, even after trial and judgment make it more reasonable, more restrictive, or whatever, and everybody starts over again." Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation),* 38B NIMLO Municipal Law Review 175, 192 (1975).

Conclusion.

That the definitional problem of taking by regulation presents difficult and heretofore unresolved constitutional issues, is a proposition that was explicitly recognized in *Penn Central,* and needs no belaboring. It is an area in which analytical intervention by this Court is an urgent national necessity.

But, as the case at bench illustrates, the question of remedies is of equal importance. Substantive rights, even of constitutional dimensions, have no meaning unless their theoretical beneficiaries can avail themselves of remedies and make those rights a reality. Here, however, Mr. and Mrs. Agins were deprived of their substantive property rights, and indeed, without so much as a day in court, through the expedient of being denied any meaningful remedy.

Moreover, permeating the opinion below is the explicitly voiced notion that it is too expensive to follow the Constitution[21] and that local governments, in order to govern, need to be given a *carte blanche* to invade private property rights with complete impunity, risking only a theoretical judicial slap on the wrist—if that. These arguments are of little merit.

It bears recalling that the same spurious doctrine was hauled out of storage in recent efforts to deny equal rights to American citizens, only to be rejected as intolerable by this Court:

> ". . . vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them." *Watson v. City of Memphis* (1963), 373 U.S. 526, 537.

[21]It is unfortunate that in structuring its economic arguments, the court below relied on polemical student writings, some of which espoused the gaffe of urging a supposed cost-benefit analysis that was premised on an assumption that no cost would be incurred. Yet such pursuit of the proverbial free lunch was improvidently endorsed.

The governmental entity that would forego the obligation of having to comply with the Constitution's "just compensation" command has its remedy in its own hands: refrain from taking private property whether by seizure or by ingenuity that by wordplay leaves the aggrieved landowner with nothing of use or value, but still liable for property taxes. To suggest that a city (and by necessary implication every petty regulatory body across the land) should have the "right" to thus wreak havoc on property owners within its jurisdiction, with nothing to fear save an occasional judicial tut-tut of the "you shouldn't have done it" genre, erodes the values protected by the Bill of Rights. Such an argument has not been tolerated with respect to other constitutionally protected rights,[22] and no reason appears why it should be countenanced as to property rights. As this Court emphasized in *Lynch v. Household Finance Co., supra,* at 405 U.S. 552, the supposed dichotomy between personal and property rights is a false one, because the former cannot be enjoyed unless the latter are respected. A government that is permitted to impoverish its citizens with impunity, is a government possessed of unbridled tyrannical powers.

Both the equities of this factual situation and the urgent national need for clarification of the substantive and remedial aspects of this litigation-spawning "taking issue" cry out for intervention by this Court.

[22]See *Bivens v. Six Unknown Named Agents* (1971), 403 U.S. 388, and its applications canvassed in *Jacobson v. Tahoe Regional Planning Agency* (1978) 566 F.2d 1353, 1364, fn. 23.

Mr. and Mrs. Agins pray that probable jurisdiction be noted.

Respectfully submitted,

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October, 1979.

APPENDIX A.

Opinion of the Supreme Court of California.

[S.F. No. 23866. Mar. 14, 1979.]

[As modified May 17, 1979.]

Donald W. Agins et al., Plaintiffs and Appellants, v. City of Tiburon et al., Defendants and Respondents.

COUNSEL

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OPINION

RICHARDSON, J.—We review the availability of inverse condemnation as a landowner's remedy when a public agency has adopted a zoning ordinance which substantially limits use of his property. We will conclude that although a landowner so aggrieved may challenge both the constitutionality of the ordinance and the manner in which it is applied to his property by seeking to establish the invalidity of the ordinance either through the remedy of declaratory relief or mandamus, he may not recover damages on the theory of inverse condemnation.

Plaintiffs own five acres of unimproved land in the City of Tiburon, Marin County. Tiburon has an area of 1,676 acres, a population of approximately 6,000, and because of its proximity to San Francisco, its aquatic facilities, temperate climate, and other geographic advantages, is a very desirable suburban residential area. Plaintiffs' real property is ridgeland, possesses views of San Francisco Bay, and was acquired by plaintiffs for residential development.

Tiburon, like every other city in California, is required by state law to prepare a general plan containing, among other things, "A land use element which designates the proposed general distribution and general location and extent of the uses of the land for housing, business, industry, open space . . . and other categories of public and private uses of land. The land use element shall include a statement of the standards of population density and building intensity recommended for the various districts and other territory covered by the plan." (Gov. Code, § 65302, subd. (a).)

Routinely, the development of a general plan entails a careful examination of numerous social and economic factors. Many cities, especially those which are too small to maintain a staff of sufficient size and technical expertise to undertake such a project, seek the advice of expert consultants. The recommendations of these consultants are considered when the local governmental entity prepares its general plan.

In January 1972 Tiburon retained two private consultants, Williams & Mocine and Dean Witter & Co., Incorporated, to prepare advisory reports. The Williams report, issued in October 1972, focused on possible land use designations and recommended that Tiburon attempt to acquire "a substantial portion of Tiburon

ridge" for "open space." Plaintiffs' property was identified in the report as one of those parcels of property which were suitable for acquisition for open space. The Witter report, dated July 1972, recommended that the purchase of open space lands be financed through the issuance of $1.25 million of general obligation bonds. The subsequent resolution of the Tiburon City Council approving sale of these bonds did not specifically authorize acquisition of plaintiffs' property or directly refer to it.

By Ordinance No. 124 N.S., effective June 28, 1973, Tiburon adopted widespread zoning modifications which drew upon but did not mirror the consultants' reports. Under the ordinance, plaintiffs' land was designated "RPD-1," defined by Ordinance No. 123 N.S. as a "Residential Planned Development and Open Space Zone." The authorized uses of land so designated are (1) *one-family dwellings*, (2) open space uses, and (3) accessory buildings and accessory uses. The permissible density of buildings is "not less than .2 nor more than 1 dwelling unit per gross acre" depending on other specified provisions. As applied to plaintiffs' five acres "RPD-1" zoning means a maximum of five dwelling units or a minimum of one. Whether plaintiffs are permitted to build five dwelling units, or fewer, will depend upon the particular architectural design contemplated and the results of the required environmental impact report.

Plaintiffs have never made application to use or improve their property following Tiburon's adoption of Ordinance No. 124 N.S., nor have they either sought or received any definitive statement as to how many dwelling units they could build on their land. On October 15, 1973, plaintiffs filed a claim against the

City of Tiburon in the amount of $2 million alleging that the adoption of Ordinance No. 124 N.S. had completely destroyed the value of their property. The city rejected the claim on November 12, 1973.

On December 4, 1973, Tiburon filed a complaint in eminent domain against plaintiffs to acquire their property, but on November 1, 1974, filed a notice of abandonment of the proceedings as then authorized by Code of Civil Procedure section 1255a, subdivision (a). (This section was repealed by Stats. 1975, ch. 1275, § 1.) The trial court entered its judgment of dismissal of the action on May 20, 1975. The city paid plaintiffs $4,500 for their necessary expenses incurred during the pendency of the action pursuant to section 1255a, subdivision (c), which then fixed the rights of a condemnee upon abandonment of a condemnation proceeding. The remedy was exclusive and the section did not include, as an element of damages, financial impairment during pendency of the eminent domain action of the owner's right to sell. Accordingly, there was no further cause of action available to plaintiffs by reason of the city's eminent domain proceeding.

On June 16, 1975, plaintiffs filed their complaint in the Marin County Superior Court against the City of Tiburon and Does One through Fifty alleging, as a first cause of action, a claim in inverse condemnation for $2 million damages and requesting, in a second cause of action, declaratory relief, asserting, among other things, that Ordinance No. 124 N.S. is unconstitutional in that it "constitutes a taking of [plaintiffs'] property without payment of just compensation."

Defendants' general demurrer to the first cause of action (inverse condemnation) was sustained without

leave to amend. Similarly, their demurrer to the second cause of action (declaratory relief) was sustained with 10 days leave to amend. Plaintiffs declined to amend their second cause of action and plaintiffs appeal from the ensuing judgment of dismissal with prejudice.

Plaintiffs contend that the limitations on the use of their land imposed by the ordinance constitute an unconstitutional "taking of [plaintiffs'] property without payment of just compensation" for which an action in inverse condemnation will lie. Inherent in the contention is the argument that a local entity's exercise of its police power which, in a given case, may exceed constitutional limits is equivalent to the lawful taking of property by eminent domain thereby necessitating the payment of compensation. We are unable to accept this argument believing the preferable view to be that, while such governmental action is invalid because of its excess, remedy by way of damages in eminent domain is not thereby made available. This conclusion is supported by a leading authority (1 Nichols, Eminent Domain (3d rev. ed. 1978) Nature and Origin of Power, § 1.42(1), pp. 1-116 through 1-121), who expresses his view in this manner: "Not only is an actual physical appropriation, under an attempted exercise of the police power, in practical effect an exercise of the power of eminent domain, but if regulative legislation is so unreasonable or arbitrary as virtually to deprive a person of the complete use and enjoyment of his property, it comes within the purview of the law of eminent domain. *Such legislation is an invalid exercise of the police power since it is clearly unreasonable and arbitrary. It is invalid as an exercise of the power of eminent domain since no provision is made for compensation.*" (Italics added.)

We have previously pointed to the general nature of the appropriate remedy in such cases. In *State of California v. Superior Court (Veta)* (1974) 12 Cal.3d 237 [115 Cal.Rptr. 497, 524 P.2d 1281], real parties had been granted a permit to develop their coastal lands by a regional commission. They brought suit when a permit was denied following an appeal to the California Coastal Zone Commission. We held that declaratory relief was an appropriate remedy by which to seek a declaration that a statute controlling development of coastal lands was facially unconstitutional. Further, insofar as the challenge was to the constitutionality of the act's *application* to the lands of the complaining parties, we concluded that the proper and sole remedy was administrative mandamus.

Similarly, a landowner alleging that a zoning ordinance has deprived him of substantially all use of his land may attempt through declaratory relief or mandamus to invalidate the ordinance as excessive regulation in violation of the Fifth Amendment to the United States Constitution and article I, section 19, of the California Constitution. He may not, however, elect to sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid. (See *Friedman v. City of Fairfax* (1978) 81 Cal.App.3d 667, 678 [146 Cal.Rptr. 687].) To the extent that *Eldridge v. City of Palo Alto* (1976) 57 Cal.App.3d 613 [129 Cal.Rptr. 575], is contrary, it is expressly disapproved.

There is a clear, direct and unquestionable constitutional basis for the protection of private property. Amendment V of the United States Constitution provides that "No person shall be . . . deprived

of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation." In concert with the foregoing Fifth Amendment language article I, section 19, of the California Constitution mandates that "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has been paid to, or into court for, the owner."

"Property," in a legal sense, has been broadly defined. The United States Supreme Court has said that the term "property" is not used in "the vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. . . . [Instead it] denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . . The constitutional provision is addressed to every sort of interest the citizen may possess." (*U.S. v. General Motors Corp.* (1945) 323 U.S. 373, 377-378 [89 L.Ed. 311, 318, 65 S.Ct. 357, 156 A.L.R. 390].)

While acknowledging the power of government to preserve and improve the quality of life for its citizens through the regulation of the use of private land, we cannot countenance the service of this legitimate need through the uncompensated destruction of private property rights. Such Fifth Amendment property rights have been equated by the constitutional draftsmen with the cherished personal protections against self-incrimination, double jeopardy, and the guarantee of due process of law. These rights are protected by the same amendment.

In balancing the constitutional rights of the landowner against the legitimate needs of government we do not ignore well established precedent. In *Pennsyl-*

vania Coal Co. v. Mahon (1922) 260 U.S. 393 [67 L.Ed. 322, 43 S.Ct. 158, 28 A.L.R. 1321], an injunction was sought to prevent a coal company from causing subsidence of property due to the company's underground mining activities. This Supreme Court opinion has generated some confusion and has even been cited erroneously for the proposition that inverse condemnation is readily available as a remedy in zoning cases because of Justice Holmes' statement that "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." (*Mahon, supra,* at p. 415 [67 L.Ed. at p. 326].) It is clear both from context and from the disposition in *Mahon,* however, that the term "taking" was used solely to indicate the limit by which the acknowledged social goal of land control could be achieved by regulation rather than by eminent domain. The high court set aside the injunctive relief which had been granted by the Pennsylvania courts and declared void the exercise of police power which had limited the company's right to mine its land. The court did not attempt, however, to transmute the illegal governmental infringement into an exercise of eminent domain and the possibility of compensation was not even considered.

In *HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508 [125 Cal.Rptr. 365, 542 P.2d 237], we examined directly the problem of available remedies for aggrieved landowners and held that inverse condemnation does not lie in zoning actions in which the complaint alleges the mere reduction of market value, and that a zoning action which merely decreases the market value of property does not violate the constitutional provisions forbidding uncompensated taking or damaging of property. In *HFH, Ltd.* we specifically noted that "This case does not present, and we therefore do not decide, the question of entitlement to compensation in the event a zoning regulation forbade substantially *all* use of the land in question. We leave the question for another day." (P. 518, fn. 16, italics in original.) We now reach that issue.

While it is true that the land uses which were regulated in *HFH, Ltd.* were commercial, we find no reason to distinguish it on that basis from similar situations in which the regulation affects land used for residential, recreational, or other purposes, or to extend the additional relief of inverse condemnation to the owners of noncommercial property. (For a discussion of a contrary analysis which recommends the extension of a damages remedy in a noncommercial context, see Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis* (1977) 86 Yale L.J. 385, 507-511.)

We are persuaded by various policy considerations to the view that inverse condemnation is an inappropriate and undesirable remedy in cases in which unconstitutional regulation is alleged. The expanding developments of our cities and suburban areas coupled with a growing awareness of the necessity to preserve our natural resources, including the land around us, has resulted in changing attitudes toward the regulation of land use. Recognition of this historic trend is not new. The United States Supreme Court perceptively observed more than 50 years ago that with the passage of time and increased concentration of people "problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private

lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, . . . And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise." (*Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365, 386-387 [71 L.Ed. 303, 310, 47 S.Ct. 114, 54 A.L.R. 1016].)

In the half century since *Euclid* the foregoing abstract principles under the force of experience have coalesced into a specific functional requirement. Community planners must be permitted the flexibility which their work requires. As we ourselves have recently observed, "If a governmental entity and its responsible officials were held subject to a claim for inverse condemnation merely because a parcel of land was designated for potential public use on one of these several authorized plans, the process of community planning would either grind to a halt, or deteriorate to publication of vacuous generalizations regarding the future use of land." (*Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 120 [109 Cal.Rptr. 799, 514 P.2d 111].)

Other commentators have recognized that the utilization of an inverse condemnation remedy would have a chilling effect upon the exercise of police regulatory

powers at a local level because the expenditure of public funds would be, to some extent, within the power of the judiciary. "This threat of unanticipated financial liability will intimidate legislative bodies and will discourage the implementation of strict or innovative planning measures in favor of measures which are less stringent, more traditional, and fiscally safe." (Hall, *Eldridge v. City of Palo Alto: Aberration or New Direction in Land Use Law?* (1977) 28 Hastings L.J., 1569, 1597.)

We envisage that the availability of an inverse condemnation remedy in these situations would pose yet another threat to legislative control over appropriate land-use determinations. It has been noted that "The weighing of costs and benefits is essentially a legislative process. In enacting a zoning ordinance, the legislative body assesses the desirability of a program on the assumption that compensation will not be required to achieve the objectives of that ordinance. Determining that a particular land-use control requires compensation is an appropriate function of the judiciary, whose function includes protection of individuals against excesses of government. But it seems a usurpation of legislative power for a court to force compensation. Invalidation, rather than forced compensation, would seem to be the more expedient means of remedying legislative excesses." (Fulham & Scharf, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance* (1974) 26 Stan.L.Rev. 1439, 1450-1451; see also Bowden, *Legal Battles on the California Coast: A Review of the Rules* (1974) 2 Coastal Zone Management J. 273.)

Other budgetary consequences reveal themselves when the land use control is exercised by means of

the initiative. "Legislation in the nature of zoning can be and has been enacted by the people through a direct initiative. Are the voters, through the initiative power, also to have this unwelcome power to *inadvertently* commit funds from the public treasury? The logical extension of requiring compensation for the mere enactment of a harsh zoning measure indicates that the answer would be in the affirmative. The potential for fiscal chaos would be great if this were the result." (28 Hastings L.J., *supra*, at p. 1598, italics in original.)

In combination, the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy, persuade us that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief under the circumstances.

Having clarified the nature of the remedies available to an aggrieved landowner, we now consider whether the property owners before us established their right to declaratory relief. We conclude that they did not.

An ordinance which on its face results in a mere diminution in the value of property is not per se improper. In *HFH, Ltd. v. Superior Court, supra,* 15 Cal.3d 508, we examined a change in zoning which reduced the value of property from $400,000 to $75,-000. We concluded that no remedy was available for a mere decrease in the value of property. By this holding we acknowledged a practical truism which had been expressed by Justice Holmes more than 50 years ago in the *Mahon* cases: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such

change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power." (*Pennsylvania Coal Co. v. Mahon, supra,* 260 U.S. at p. 413 [67 L.Ed. at p. 325].)

Accepting as we must the general proposition that whether a regulation is excessive in any particular situation involves questions of degree, turning on the individual facts of each case, we hold that a zoning ordinance may be unconstitutional and subject to invalidation only when its effect is to deprive the landowner of substantially all reasonable use of his property. The ordinance before us had no such effect. According to the wording of the ordinance, of which we may take note, the RPD-1 zoning allows plaintiffs to build between one and five residences on their property. This belies plaintiffs' claim that development of their land is forever prevented. Taking cognizance of the use which plaintiffs were entitled to make of their land the trial court was justified in finding that the ordinance did not unconstitutionally interfere with plaintiffs' entire use of the land or impermissibly decrease its value. The trial court acted properly in determining that plaintiffs were not, as a matter of law, entitled to a favorable judgment in declaratory relief.

Plaintiffs also argue that the city's "precondemnation activities," those being the authorization of studies which recommended acquisition of plaintiffs' land for open space and bonds for its purchase, and the filing and subsequent abandonment of an eminent domain proceeding, were so unreasonable as to provide a separate basis for an action for inverse condemnation. Plaintiffs err and we do not find persuasive their re-

liance on *Klopping v. City of Whittier* (1972) 8 Cal.3d 39 [104 Cal.Rptr. 1, 500 P.2d 1345], for support for their contention.

Klopping involved a plaintiff's recovery for the decline in market value as the result of an unreasonable delay in the institution of eminent domain proceedings following announcement of intent to condemn, and other unreasonable conduct prior to condemnation. In the matter before us there was no such delay or conduct. Tiburon instituted eminent domain proceedings less than six months after Ordinance No. 124 N.S. was adopted. It is manifest that general land-use planning discussions and related decision-making by elected officials must be both unhampered and public. Together or singly, neither process constitutes a "taking" of the property under consideration. Any other conclusion would violate sound public policy.

Our appellate courts have recognized the appropriate controlling principles. "*Selby* [*supra*, 10 Cal.3d 110] made clear that *Klopping* [*supra*, 8 Cal.3d 39] was no support for a claim that planning designations constitute takings." (*Navajo Terminals, Inc. v. San Francisco Bay Conservation etc. Com.* (1975) 46 Cal.App. 3d 1, 4 [120 Cal.Rptr. 108].) As was noted in *City of Walnut Creek v. Leadership Housing Systems* (1977) 73 Cal.App.3d 611 [140 Cal.Rptr. 690], ". . . the inclusion of the property for public use in a general plan does not give rise to a cause of action. If calling a bond election and urging passage to secure funds for a public purpose constituted a taking, the agency so acting would be subject to suit whether or not the issue carried. The expression of political preference cannot be so burdened." (Pp. 622-623.)

Recognizing the constitutionally protected property interests here involved, we also accept the reasonable latitude which must be afforded public officials in the planning for and implementation of legitimate land use goals. These twin purposes will be served by preserving for the landowner, in appropriate cases, declaratory relief or mandamus remedies. However, the use of inverse condemnation with its imposition of money damages upon the public entity would, in our view, unwisely inhibit the proper and necessary exercise of a valid police power.

The judgment is affirmed.

Bird, C. J., Tobriner, J., Mosk, J., Manuel, J., and Newman, J., concurred.

CLARK, J., Dissenting.—"Private property may be taken *or damaged* for public use *only* when just compensation . . . has first been paid to . . . the owner." (Cal. Const., art. I, § 19; italics added.) "Damage," as used in the constitutional provision, has always included diminution in intrinsic value even when falling short of actual taking, spoilation or invasion. (*Reardon v. San Francisco* (1885) 66 Cal. 492 [6 P. 317].)

It must be clear to all of us that, as alleged by plaintiffs, the City of Tiburon has decided through the political process that in order to preserve its way of life and to maintain what is already among the highest residential land values in the state,[1] certain of its property owners must sacrifice use of their lands. Such lands—including plaintiffs'—are thus alleged to have been damaged in order to preserve or enhance the value of undisturbed land. This is the clearest of examples wherein our system functions " 'to sacrifice the individual to the community, and it seems very difficult in reason to show why the [City of Tiburon] should not pay for property which it destroys or impairs the value . . . .' " (*Bacich v. Board of Control* (1943) 23 Cal.2d 343, 351 [144 P.2d 818].)

Recognizing the policy considerations in resolving the question when a "taking" must be paid for by government and when it may be deemed merely a permissible intrusion incident to governmental function, the United States Supreme Court has stated that a factual consideration "is the extent of the diminution [of property value]. When it reaches a certain magnitude, in most if not all cases there must be an exercise

[1]It is alleged by plaintiffs' complaint and admitted by the city's demurrer that the City of Tiburon has "the highest land value per acre for suburban areas in the State of California."

of eminent domain and compensation to sustain the act." (*Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 413 [67 L.Ed. 322, 325, 43 S.Ct. 158, 28 A.L.R. 1321].) What greater diminution can there be than where—as here—plaintiffs have alleged and the City of Tiburon has admitted that the ordinance complained of "has completely destroyed the value of Plaintiffs' property for any purpose or use whatsoever . . ."? We have said that the "underlying purpose of our constitutional provision in inverse—as well as ordinary—condemnation is 'to distribute through the community the loss inflicted upon the individual by the making of public improvements' [citation]; 'to socialize the burden . . .—to afford relief to the landowner in cases in which it is unfair to ask him to bear a burden that should be assumed by society' [citation]." (*Holtz v. Superior Court* (1970) 3 Cal.3d 296, 303 [90 Cal.Rptr. 345, 475 P.2d 441].) If those words have any meaning at all this must be the case where they are applicable—unless, of course, the majority deem they are not bound by the honored rule of law which prevents the court on a demurrer from finding factual matters contrary to matters well pleaded in the complaint.[2] (See, *Serrano v. Priest* (1971) 5 Cal.3d 584, 591 [96 Cal.Rptr. 601, 487 P.2d 1241].)

[2]Conclusionary allegations of damage to property are insufficient to support—against a demurrer—a complaint in inverse condemnation. (See *Hecton v. People ex rel. Dept. of Transportation* (1976) 58 Cal.App.3d 653 [130 Cal.Rptr. 230].) Additionally, the particular facts of the case must be set out in the complaint. (*Id.*, at p. 657.) Plaintiffs have alleged with factual particularity the significant activities taking place prior to and constituting the inverse condemnation. They also allege the lack of remaining reasonable beneficial use resulting from these activities. (Cf. *Pineheiro v. County of Marin* (1976) 60 Cal.App.3d 323, 328 [131 Cal.Rptr. 633].)

The majority opinion attempts to justify its judgment on the ground that plaintiffs—if they are entitled to relief at all—must look to some remedy other than inverse condemnation. (*Ante*, p. —.) While purporting to recognize that the Fifth Amendment mandates "private property shall not be taken for public use, without just compensation," that the " 'constitutional provision is addressed to every sort of interest the citizen may possess' " (*ante*, p. —), and that "we cannot countenance the service of [the need of government to improve the quality of life] through the uncompensated destruction of private property rights" (*id.*), the majority refuse to follow these precepts. Their refusal is grounded on their mistaken analysis of this court's earlier decision in *HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508 [125 Cal.Rptr. 365, 542 P.2d 237].

In *HFH* the majority held that inverse condemnation does not lie in a downzoning action when the complaint alleges mere reduction in market value. That case expressly stands for the proposition that a zoning ordinance which "merely decreased the market value of property" does not necessarily violate constitutional provisions "forbidding uncompensated taking or damaging" of property. (*HFH, Ltd. v. Superior Court, supra,* 15 Cal.3d 508, 518.) If, as the majority held in *HFH*, the difference between "merely decreasing" a property value on the one hand and "taking" a property interest on the other is one of degree, the majority today—in view of the admitted allegation that the ordinance "has completely destroyed the value of plaintiffs' property for any purpose or use whatsoever"—obliterate that distinction. Under today's holding inverse condemnation is no longer an available remedy—perhaps short of government actually dispossessing an owner—whatever the harshness of a zoning regulation.

The distinction which the majority purport to carefully draw in *HFH* has been rejected and that case provides no support for today's decision.

Until today, this court has adhered to its rule that a harsh zoning regulation gives rise to inverse condemnation. (See *Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 46 [104 Cal.Rptr. 1, 500 P.2d 1345].) The rule, moreover, is compelled by the Legislature: "The Legislature hereby . . . declares that this article [Open-Space Zoning] is not intended and shall not be construed, as authorizing the city . . . to exercise its power to adopt . . . an open-space zoning ordinance in a manner which will . . . damage private property for public use without the payment of just compensation therefor." (Gov. Code, § 65912; see also, Gov. Code, § 51073.) However, the majority reject the established rule and legislative direction in disapproving the recent case of *Eldridge v. City of Palo Alto* (1976) 57 Cal.App.3d 613 [129 Cal.Rptr. 575] (petn. for hg. den. July 15, 1976). That case involves a particularly harsh zoning ordinance. The court concluded, after a detailed review of pertinent decisions, "that a valid zoning ordinance may nevertheless operate so oppressively as to amount to a taking, thus giving an aggrieved landowner a right to damages in inverse condemnation." (*Id.*, at p. 621.) The "leading authority" relied on by the majority (*ante*, p. —) is in agreement with *Eldridge*. (See, 1 Nichols on Eminent Domain (3d rev. ed. 1978) Nature and Origin of Power, § 1.42(1), pp. 1-116 through 1-121; 2 Nichols on Eminent Domain (3d rev. ed. 1978) Taking and Damage, § 6.3, p. 6-65.)

When a zoning restriction is so harsh as to transcend a constitutionally protected property right is a question

of fact to be determined by trial rather than by demurrer. (See *Wilkins v. City of San Bernardino* (1946) 29 Cal.2d 332, 338-339 [175 P.2d 542]; *Eldridge v. City of Palo Alto, supra,* 57 Cal.App.3d 613, 628.) Plaintiffs have well pleaded a cause of action in inverse condemnation, and should be afforded an opportunity to prove their allegations.

Today's real issue is the extent to which a court will permit—even encourage—governmental agency intrusion into a constitutionally protected area. The majority argue we must condone greater intrusion; that we must recognize "changing attitudes toward the regulation of land use" (*ante,* p. —); that community planners must be permitted the flexibility which their work requires (*ante,* p. —); that the use of inverse condemnation "will have a chilling effect upon the exercise of police regulatory powers at a local level" and " 'will discourage the implementation of strict or innovative planning measures in favor of measures which are less stringent, more traditional, and fiscally safe' " (*id.*); and that enactment of a zoning ordinance being essentially a legislative process, courts should cease affording a legal remedy in inverse condemnation.[3]

[3]The majority's holding unnecessarily goes far beyond a mere determination that—in the majority's view—plaintiffs in this case are entitled to no relief. In the concluding portions of the majority opinion it is stated—although as earlier noted contrary to established rules on review of judgments following sustaining of demurrer—that the Tiburoan ordinance does not deprive plaintiffs of "substantially all resonable use" of their property (*Ante,* p. —.) Thus *HFH Ltd. v. Superior Court, supra,* 15 Cal.3d 508, requires rejection of plaintiffs' claim because there has been a "mere diminution" of value as opposed to a taking of property, according to the majority. The majority's further assertion that inverse condemnation is no longer available to compensate an aggrieved landowner, appears to be—after more than a century of settled law

Today's decision effectively pronounces that henceforth in California title to real property will no longer be held in fee simple but rather in trust for whatever purposes and uses a governmental agency exercising legislative power elects, without compensation. While the majority of this court can finally declare that such a taking does not offend local constitutional prohibitions, their judgment does not foreclose federal constitutional examination. It is clear that compelling federal authority requires compensation for the taking alleged by plaintiffs in this case. The United States Supreme Court will hopefully adhere to Justice Holmes' admonition that "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (*Pennsylvania Coal Co. v. Mahon, supra,* 260 U.S. 393, 416 [67 L.Ed. 322, 326]; see also *Goldblatt v. Hempstead* (1962) 369 U.S. 590, 594 [8 L.Ed.2d 130, 134, 82 S.Ct. 987]; *Armstrong v. United States* (1960) 364 U.S. 40, 49 [4 L.Ed.2d 1554, 1561, 80 S.Ct. 1563]; *U.S. v. Central Eureka Mining Co.* (1958) 357 U.S. 155, 168 [2 L.Ed.2d 1228, 1236, 78 S.Ct. 1097]; *Berman v. Parker* (1954) 348 U.S. 26, 36 [99 L.Ed. 27, 39, 75 S.Ct. 98]; *U.S. v. Willow River Co.* (1945) 324 U.S. 499, 502 [89 L.Ed. 1101, 1107, 65 S.Ct. 761); *Block v. Hirsch* (1921) 256 U.S. 135 [65 L.Ed. 865, 41 S.Ct. 458, 16 A.L.R. 165].) Lower federal court decisions are universally contrary to the majority opinion in this case. When the Richmond Redevelopment Agency

to the contrary—obiter dicta. Such far-reaching pronouncement would be better left to another day and case wherein the issue is squarely presented and the parties have full opportunity to address it.

urged that because it exercised police powers it did not have to pay just compensation to a landowner, the Ninth Circut held: "It is clear . . . that a governmental agency acting pursuant to the State's police power must pay just compensation for any taking it effects." (*Richmond Elks Hall Assn. v. Richmond Redevelopment* (9th Cir. 1977) 561 F.2d 1327, 1332; see also *Beneson v. United States* (Ct.Cl. 1977) 548 F2d 939, 947; *Drakes Bay Land Company v. United States* (Ct.Cl. 1970) 424 F.2d 574, 584; *Dahl v. City of Palo Alto* (N.D.Cal. 1974) 372 F.Supp. 647, 648-649.)

The Supreme Court's latest expression of continuing adherence to the mandate of the Fifth and Fourteenth Amendments is contained in *Lake County Estates, Inc. v. Tahoe Regional Planning Agency* (1979)—U.S. —[59 L.Ed.2d 401, 99 S.Ct. —]. In that case lands originally zoned as residential and commercial were rezoned by an interstate agency to allow limited residential use subordinated to public recreational use. Property owners claimed that the land use ordinance constituted inverse condemnation. The district court held that a cause of action for inverse condemnation was sufficiently alleged but that the action could not be maintained against the interstate agency, and that individual members of the agency were immune from suit. The court of appeals held that the interstate agency was federal in character, that the agency was therefore immune under the Eleventh Amendment, and that individual members of the agency were also immune. The Supreme Court answered by holding a cause of action was properly alleged, and that the interstate agency was neither federal in character nor immune, although individual agency members were immune.

While the court was primarily concerned with immunity issues, the sense of the holding is that an action in inverse condemnation lies for a taking brought about by land use regulation of the very nature involved in the instant case.

Particular areas of concern must be seen arising from today's decision. First, the majority's solution is really a nonremedy for an aggrieved landowner. If he can protect his lands only through a proceeding to declare the invalidity of a land use regulation, he must lose interim use of his land—most likely for a period of years—suffering substantial legal costs, even though he may ultimately prevail. Moreover, there is nothing to prevent the governmental agency from reenacting a modified ordinance compelling a second or even third proceeding—a burden exceeding bare possibility in view of the majority's invitation to oppressive land use limitation. Many landowners—particularly small ones—will be economically unable to challenge even a confiscatory enactment, being compelled to walk away from their properties.

Perhaps of greater concern is the consequence that Tiburon—and many other govenmental agencies enacting similar land use plans—will price properties within their control out of reach of most people. Only the most wealthy will be able to afford purchase of and construction on lands in such areas. The environment which Tiburon seeks to preserve will disproportionately benefit that wealthy landowner, whose home will be surrounded by open space, unobstructed view and unpolluted atmosphere.

I reject the majority rationalization. It abdicates our responsibility to give meaning and substance to constitutional mandate.

Today's decision must further encourage city councils and their zoners to politically preserve entrenched property use. The decision not only shuts Mr. Agins out from our courtroom, but also his successor-owners from sharing a nice but exclusive environment.

The judgment of dismissal should be reversed.

APPENDIX B.

Judgment of Dismissal.

Superior Court of California, County of Marin.

Donald W. Agins and Bonnie G. Agins, Plaintiffs, v. City of Tiburon, a municipal corporation, and Does One through Fifty, Defendants. No. 75873.

Filed: May 5, 1976.

The Court having sustained the demurrer of Defendant City of Tiburon to the First Cause of Action in the Complaint herein without leave to amend and having sustained the demurrer of said Defendant to the Second Cause of Action therein with ten days leave to amend and Plaintiffs having failed to so amend.

The above entitled action is hereby dismissed with prejudice.

DATED: May 5, 1976

/s/ Jack L. Blaine
JACK L. BLAINE
JUDGE OF THE SUPERIOR COURT
PRO TEM

APPENDIX C.

Notice of Appeal to the Supreme Court of the United States.

In the Supreme Court of the State of California.

Donald W. Agins, et al, Plaintiffs and Appellants, v. City of Tiburon, et al, Defendants and Respondents. No. S.F. 23866, (Super. Ct. No. 75873).

Filed: July 6, 1979.

Notice is hereby given that DONALD W. AGINS and BONNIE G. AGINS, the Plaintiffs and Appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of California affirming the judgment of dismissal, entered in this action on May 17, 1979.

This appeal is taken pursuant to 28 U.S.C. §1257(2).
Dated: July 5, 1979.

REGINALD G. HEARN
100 California Street
San Francisco, California 94111

POLLOCK, WILLIAMS & BERWANGER
JOHN P. POLLOCK
800 West Sixth Street - Suite 820
Los Angeles, California 90017

GIDEON KANNER
P.O. Box 5133
Sherman Oaks, California

/s/ By John P. Pollock
JOHN P. POLLOCK
Attorneys for Plaintiffs and Appellants

PROOF OF SERVICE BY MAIL

State of California, County of Los Angeles—ss.

I am a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 800 West Sixth Street, Suite 820, Los Angeles, California 90017.

On July 5, 1979, I served the within NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES on the Defendants and Respondents in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Robert I. Conn
City Attorney

Gary T. Ragghianti
Deputy City Attorney,
City of Tiburon
1534 Fifth Avenue
San Rafael, California 94901

I certify, under penalty of perjury, that the foregoing is true and correct.

Executed on July 5, 1979, at Los Angeles, California.

/s/ Jennie M. Butler
Jennie M. Butler

APPENDIX D.

Ordinance No. 123 N.S.

AN ORDINANCE OF THE CITY OF TIBURON AMENDING SECTION 10-4, ADDING SECTION 10-4.1 (RESIDENTIAL PLANNED DEVELOPMENT AND OPEN SPACE ZONES) AND SECTION 10-4.2 OF ORDINANCE NO. 9 N. S. (RESIDENTIAL MULTIPLE PLANNED ZONE) TO THE TIBURON ZONING ORDINANCE, AMENDING SECTION 23 BY ADDING CONDITIONAL USES IN THE RPD ZONES, AMENDING SECTION 6-28, AND BY ADDING SECTION 6-61.1.

The City Council of the City of Tiburon does hereby ordain as follows:

Section 1: Findings. The City Council does hereby find and declare as follows:

(a) Through its general plan and zoning ordinances based thereon, the City of Tiburon provides a community in which essentially most types of traditional land uses are permitted. This includes lands devoted to the following uses: residential, commercial, agricultural, recreational and community service facilities, both public and private. This variety of developed land uses is oriented and available to and utilized by all social and economic levels. Having provided this extensive range of uses, recognizing that the category of open space land is a land use equal in importance to the traditional categories enumerated above; further recognizing that the City of Tiburon has a vital interest in the protection and preservation of open space land for the benefit of all of its citizens; and further recognizing that, once portions or all of the remaining open

space land within City limits is permitted to develop with any substantial degree of intensity as traditionally permitted, the opportunity to recover its open space character will have been virtually lost, the City Council finds and declares that open space land is a critically limited and valuable resource which must be preserved and conserved wherever possible.

(b) The preservation and conservation of open space land is necessary to assure its continued availability for agricultural purposes, for the enjoyment of scenic beauty, for recreation, for protection of the ecology and environment, for the containment of urban development, and for retention in its natural or near natural state to protect the community against hazards resulting from its disturbance by man or nature.

(c) It is in the public interest to avoid unnecessary conversion of open space land to strictly urban uses, thereby protecting against the resultant adverse impacts, such as air, noise and water pollution, destruction of scenic beauty, disturbance of the ecology and environment, hazards related to geology, fire and flood, and other demonstrated consequences [of] sic urban sprawl.

(d) The Open Space Element of the Tiburon General Plan has been the subject of extensive study and deliberation by the staff, Planning Commission and Council, drawing upon a wide variety of relevant expertise. This effort has resulted in the development of a statement of functions, goals, policies, action programs, classifications and inventories of open spaces. This Open Space Element must be implemented, among other ways, by a comprehensive regulatory zoning ordinance governing the uses of open space land. Further, the anticipated increase in the populatuion of the Tiburon Peninsula demands that the City effectuate the

Open Space Element of the Tiburon General Plan at the earliest possible date and thereby assure that the interests of all of its people are met through the orderly growth and development of the City and the preservation and conservation of its limited and valuable resources.

Section 2. Amendment. The City Council hereby amends Section 10-4 of Ordinance No. 9 N.S., the Tiburon Zoning Ordinance, to read as follows:

"*Section 10-4: RESIDENTIAL PLANNED DEVELOPMENT AND OPEN SPACE ZONE (RPD-1).*

(A). *Purpose.* The purpose and intent of this zone is (a) to protect the public health, safety and welfare; (b) to protect and preserve open space land as a limited and valuable resource; (c) to permit the reasonable use of open space land, while at the same time preserving and protecting its inherent open space characteristics to assure its continued availability for the following: as agricultural land, scenic land, recreation land, conservation or natural resource land; for the containment [of] sic urban sprawl and the structuring of urban development, and for the retention of land in its natural or near natural state to protect life and property in the community from the hazards of fire, flood and seismic activity; and (d) to coordinate with and carry out federal, state, regional, county and city open space plans.

(B). *Definitions.* As used in this section, unless otherwise apparent from the context, the following definitions shall apply:

1. "Conservation or Natural Resource Land", land which possesses or encompasses conservation or natural resources.

2. "Conservation or Natural Resource" includes, but is not necessarily limited to, streams, watersheds, ground water recharge, soils, wildlife habitat, as defined herein, special land forms, natural vegetation.

3. "Open Space Land", any parcel or area of land essentially unimproved or in its natural state, and devoted to an open space use as defined herein, and which is designated in the Open Space Element for an open space use.

4. "Residential Planned Development and Open Space Zone", any area of land or water designated RPD and subject to all of the terms and regulations of this section.

5. "Open Space Use" means the use of land for

a. Public recreation.

b. Enjoyment of scenic beauty.

c. Conservation or use of natural resources.

d. Protection of man and his artifacts (buildings, property, etc.).

e. Containment and structuring of urban development.

6. "Recreation land", any area of land or water susceptible to recreational uses.

7. "Scenic land", any area of land or water which possesses scenic qualities worthy of preservation.

8. "Wildlife habitat", any area of land or water valuable or necessary to the preservation or enhancement of wildlife resources.

(C). *Uses Allowed By Right.*

1. One-family dwellings.

2. Open-space uses.

3. Accessory buildings and accessory uses.

(D). *Land and Structure Regulations.*

1. *Density.* Density shall be not less than .2 nor more than 1 dwelling unit per gross acre, subject to the provisions of section 10-4(F) below.

2. *Maximum Building Height.* No principal building shall exceed 30 feet in height, and no accessory building shall exceed 15 feet in height.

3. The development of dwellings or dwelling groups that create the appearance of apartment-like structures through excessive mass, bulk, or repetition of design features, shall be prohibited.

(E). *Permanence of Open Space.* Land to be preserved as open space shall be maintained as permanent open space by dedication to the City of fee title or of scenic easements, by deed restriction approved by the City Attorney, or by other methods acceptable to the City.

(F). *Standards.* In reviewing the elements of the Master Plan, particularly, but not limited to, the density, circulation system and lot design, consideration shall be given to, and affirmative findings must be made by the Planning Commission and City Council on, the following factors:

1. Whether the density sought in the proposed development is compensated for by surrounding open areas.

2. Whether the proposed arrangement of residential units and design of the circulation system provide for an adequate transition and maximum compatibility with adjoining patterns of development and open space.

3. Whether maximum effort has been made to minimize grading and maximize retention and preservation

of natural elevations, ridgelands and natural features, including lands too steep for development, geologically unstable areas, wooded canyons, areas containing significant native flora and fauna, rock outcroppings, view sites, areas suitable for active or quiet recreation, watersheds and watercourses. Ridgelines shall be preserved through siting and building controls to minimize visual impact and to allow access along corridors.

4. Whether the plan will be desirable to the public convenience and welfare and will be in harmony with the Open Space, and other Elements and objectives of the Tiburon General Plan.

(G). *Requirements of Master and Precise Plans.* Owners of land within the RPD zone who desire development shall, prior to any land or road grading or subdivision, and prior to any improvements being made on said property, submit a Master Plan to the Planning Commission, together with the required fee. No building permit shall be issued for improvements of any type until a Master Plan and Precise Plan for the development have, after public hearing, been approved by resolutions of the Planning Commission, and only until after the City Council, after Public hearing, has by ordinance approved the Master Plan and by resolution, the Precise Plan. The procedure for approval of the Master Plan shall be the same as that provided under State law for the adoption of a zoning ordinance.

1. *Master Plan.*

a. The Master Plan and Text shall be prepared by such qualified professional practitioners in city planning, urban design, architecture, landscape architecture, and civil and structural engineering as may be directed by the city agency approving said plans. The Master Plan shall include all contiguous property under a

single ownership and shall include such information as may be appropriate for purposes of interrelating the proposed development with existing and proposed uses of adjacent property.

b. The Master Plan shall include:

(1) A general site plan showing the following:

(a) existing and proposed locations and uses of all structures and areas.

(b) lot design, circulation system including existing and proposed streets, walkways, and other rights-of-way or easements.

(c) preliminary grading, drainage, and landscaping proposal indicating existing and proposed topography at appropriate contour intervals, location of existing trees and groupings and other natural features and proposed landscape treatment showing location and types of trees, ground cover, walkways, paving and fencing.

(2) Preliminary elevations, perspectives, and sufficient visual and written information to indicate proposed setbacks, height, bulk, coverage, density, indoor-outdoor relationships, relationships between structures, and predominant views by occupants and other users of the site and structures.

(3) A statement of concepts, indicating how the development satisfies relevant human needs for open space, views, variety, harmony within the development and the surrounding areas, and clarity of organization.

(4) A proposal for dedication and/or improvement and maintenance of open space, circulation ways, view easement and recreation areas for all property included in the Master Plan.

2. *Precise Plan.*

a. Subsequent to the approval of the Master Plan by the Planning Commission and the City Council, the applicant shall submit to the Planning Commission a Precise Plan, in substantial conformance to the Master Plan, pursuant to the provisions of section 27-2, together with the required fee.

b. Detached structures may be exempt from Precise Plan procedures only if so specified as part of the previous Master Plan approval.

c. In addition to the information required to be submitted with the Precise Plan by section 27-2, the applicant shall submit the following data:

(1) Engineering studies in sufficient detail to indicate adequacy of soils, flood control, storm drainage, sewage disposal, and public utilities for the property; such engineering studies shall include an in-depth geologic and soils investigation and examination and shall fully and clearly present: (a) all pertinent data, interpretations and evaluations; (b) the significance of the data, interpretations and evaluations with respect to the actual development or implementation of the intended land use, and with respect to the effect upon future geological processes both on and off the site; (c) recommendations for any additional investigations that should be made. All costs and expenses incurred as a result of the requirements of this section including the costs and expense of an independent review of the material submitted hereunder by qualified persons retained by the City, shall be borne by the applicant.

(2) A staging proposal indicating sequence and approximate time schedule for all development indicated.

3. *Amendments.* The Master and Precise Plans may be amended or modified by following the same procedure required to adopt said plans.

4. In the event that the data submitted with the Precise Plan pursuant to Section 10-4(G)2, particularly, but not limited to, the engineering studies, indicate that the proposed arrangement of residential units, design of the circulation system or density, as shown on the previously approved Master Plan, would be rendered inharmonious with the Tiburon General Plan, or would be inconsistent with the standards contained in this section, then the City or the applicant shall initiate proceedings to amend the Master Plan to reflect the changes shown by said data.

5. *Revocation and Expiration.*

a. Precise Plans shall automatically expire one year after their approval by the City Council unless construction has been commenced within that year or unless previously extended by resolutions of the Planning Commission and City Council.

b. Master Plans shall automatically expire two years after their approval by the City Council unless construction has been commenced within that two-year period, or unless previously extended by resolutions of the Planning Commission and City Council.

Section 3. Amendment. Section 10-4.1 is hereby added to Ordinance No. 9 N.S., the Zoning Ordinance, to read as follows:

"SECTION 10-4.1: RESIDENTIAL PLANNED DEVELOPMENT AND OPEN SPACE ZONE (RPD-2).

This zone shall have the same purposes, definitions, uses, land and structure regulations, standards and pro-

cedures as in the RPD-1 zone, except that density shall be not less than 1.1 nor more than 2.5 dwelling units per gross acre."

Section 4. Amendment. Section 10-4.2 is hereby added to Ordinance No. 9 N.S., the Zoning Ordinance, to read as follows:

"Section 10-4.2: RESIDENTIAL MULTIPLE PLANNED AND OPEN SPACE ZONE (RMP).

This zone shall have the same purposes, definitions, uses, standards and procedures as in the RPD-1 zone, except as follows:

(A). Uses allowed by right shall include multi-family dwellings.

(B). *Land and Structure Regulations.*

1. *Density.* Density shall be not less than 3 nor more than 13 dwelling units per gross acre, subject to the provisions of Section 10-4(E).

2. *Maximum Building Height.* No principal building shall exceed 30 feet in height, and no accessory building shall exceed 15 feet in height.

3. *Floor Area Ratio.* The floor area ratio shall not exceed 40%.

4. If the average natural slope of the lot or parcel is over 15%, the minimum lot area per dwelling unit shall be as follows:

Slope	Lot area required
15-20%	3,500 sq. ft./unit
20-25%	5,250 sq. ft./unit
25-30%	7,000 sq. ft./unit
30-35%	10,500 sq. ft./unit
35-45%	14,000 sq. ft./unit

Section 5. Amendment. Section 6-28 of Ordinance No. 9 N.S., the Zoning Ordinance, is hereby amended to read as follows:

"6-28: Floor Area, Floor Area Ratio: "Floor area ratio", or "F.A.R." means the floor area of the building or buildings on a lot, divided by the area of that lot. "Floor area" is the sum of the gross horizontal areas of the several floors of the building or buildings measured from the exterior faces of the exterior walls and shall exclude the following: all unenclosed horizontal surfaces such as balconies, courts, decks, porches, terraces."

Section 6. Amendment. Ordinance No. 9 N.S., the Zoning Ordinance, is hereby amended by adding Section 6-61.1, to read as follows:

"6-61.1: Slope, Average Natural: The average of the natural ground slope of a lot or parcel, measured at 90° to contours."

Section 7. Amendment. Section 23(L) of Ordinance No. 9 N.S., the Zoning Ordinance, is hereby amended to read as follows:

"(L) The keeping of horses in A-2, AR, RO-1, RO-2, R-1, RPD-1 and RPD-2 zones, subject to the obtaining of a license for each horse pursuant to the Tiburon Horse License Ordinance. Each such use permit shall be terminable upon the revocation of the license issued under the Horse License Ordinance and subject to the minimum lot area requirements of said ordinance."

Section 8. Amendment. Section 23 of Ordinance No. 9 N.S., the Zoning Ordinance, is hereby amended by adding subsections (M), (N), and (O), to read as follows:

"(M) Agricultural uses in the RPD-1 and RPD-2 zones.

(N) botanical conservatories, outdoor nature laboratories and similar facilities in the RPD-1 and RPD-2 zones.

(O) Nature wildlife sanctuaries in the RPD-1 and RPD-2 zones."

Section 9. Separability. If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid or unconstitutional by the decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of the ordinance. The City Council of the City of Tiburon hereby declares that it would have passed this ordinance, and each section, subsection, sentence, clause or phrase thereof, irrespective of the fact that any one or more other sections, subsections, sentences, clauses or phrases may be declared invalid or unconstitutional.

Section 10. Effective Date. This ordinance shall take effect and be in force thirty days after the date of passage, and before the expiration of fifteen days after its passage, the same shall be published, with the names of the members voting for and against the same, at least once in a newspaper of general circulation published in the City of Tiburon.

PASSED AND ADOPTED at a regular meeting of the City Council of the City of Tiburon held on June 28th, 1973, by the following vote:

AYES: Councilmen: Aramburu, Fanning, Sennett

NOES: Councilmen: Becker

ABSENT: Councilmen: Littman

S/Branwell Fanning
BRANWELL FANNING
Mayor of the City of Tiburon

ATTEST:
S/Bert Balmer
BERT BALMER, City Manager/Clerk

APPENDIX E.

Ordinance No. 124 N.S.

AN ORDINANCE OF THE CITY OF TIBURON AMENDING ORDINANCE NO. 9 N.S., THE TIBURON ZONING ORDINANCE, BY AMENDING THE ZONING MAP TO CHANGE THE CLASSIFICATION OF CERTAIN PROPERTY LOCATED IN THE CITY OF TIBURON FROM R-1-C, R-P, P, RO-1-C, RO-2-C, RO-1 AND RO-2 TO RPD-1 AND RPD-2, AND FROM R-3 TO RMP.

The City Council of the City of Tiburon does hereby ordain as follows:

Section 1. Findings.

The City Council does hereby find and declare as follows:

(a) Through its general plan and zoning ordinances based thereon, the City of Tiburon provides a community in which essentially most types of traditional land use are permitted. This includes lands devoted to the following uses: residential, commercial, agricultural, recreational and community service facilities, both public and private. This variety of developed land uses is oriented and available to and utilized by all social and economic levels. Having provided this extensive range of uses; recognizing that the category of open space land is a land use equal in importance to the traditional categories enumerated above; further recognizing that the City of Tiburon has a vital interest in the protection and preservation of open space land for the benefit of all of its citizens; and further recognizing that, once portions or all of the remaining open land within city limits is permitted to develop

with any substantial degree of intensity as has been traditionally permitted, the opportunity to recover its open space character will have been virtually lost; the City Council finds and declares that open space land is a critically limited and valuable resource which must be preserved and conserved wherever possible.

(b) The preservation and conservation of open space land is necessary to assure its continued availability for agricultural purposes, for the enjoyment of scenic beauty, for recreation, for protection of the ecology and environment, for the containment of urban sprawl and structuring and shaping of urban development, and for retention in its natural or near natural state to protect the community against hazards resulting from its disturbance by man or nature.

(c) It is in the public interest to avoid unnecessary conversion of open space land to strictly urban uses, thereby protecting against the resultant adverse impacts, such as air, noise and water pollution, traffic congestion, destruction of scenic beauty, disturbance of the ecology and environment, hazards related to geology, fire and flood, and other demonstrated consequences of urban sprawl.

(d) The Open Space Element of the Tiburon General Plan has been the subject of extensive study and deliberation by the staff, Planning Commission, and Council, drawing upon a wide variety of relevant expertise. This effort has resulted in the development and adoption of a statement of functions, goals, policies, action programs, classifications and inventories of open spaces. This Open Space Element must be implemented, among other ways, by a comprehensive regulatory zoning ordinance governing the uses of open space land.

Further, the anticipated increase in the population of the Tiburon Peninsula demands that the City effectuate the Open Space Element of the Tiburon General Plan at the earliest possible date and thereby assure that the interests of all of its people are met through the orderly growth and development of the City and the preservation and conservation of its limited and valuable resources.

(e) The unique characteristics of the property which is rezoned by this ordinance consist of a wide variety of features which indicate the desirability of minimizing overdevelopment of said property. Much of the area is excessively steep and slope stability ranges from good to poor. The ridges and slopes are a scenic asset as viewed from other areas.

(f) The people of the State, by enacting Article XXVIII, "Open Space Conservation", of the California Constitution in 1966, and the State Legislature have demonstrated increasing concern, interest and the desire to preserve and protect open space. In 1970 and 1971 the State enacted legislation to require addition of an open space element to city and county general plans and prohibiting issuance of building permits, approval of subdivisions, or adoption of zoning ordinances inconsistent therewith. The Legislature declared its intent as follows:

> "(a) To assure that cities and counties recognize that open space land is a limited and valuable resource which must be conserved wherever possible.
>
> (b) To assure that every city and county will prepare and carry out open-space plans which, along with state and regional open-space plans,

will accomplish the objectives of a comprehensive open-space program."

The Legislature found and declared as follows:

"(a) That the preservation of open-space land, as defined in this article, is necessary not only for the maintenance of the economy of the state, but also for the assurance of the continued availability of land for the production of food and fiber, for the enjoyment of its residents, for recreation and for the use of natural resources.

(b) That discouraging premature and unnecessary conversion of open-space land to urban uses / is a matter of public interest and will be of benefit to urban dwellers because it will discourage non-contiguous development patterns which unnecessarily increase the cost of community services to community residents.

(c) That the anticipated increase in the population of the state demands that cities, counties, and the state at the earliest possible date make definite plans for the preservation of valuable open-space land and take positive action to carry out such plans by the adoption and strict administration of laws, ordinances, rules and regulations as authorized by the charter or by other appropriate methods.

(d) That in order to assure that the interests of all its people are met in the orderly growth and development of the state and the preservation and conservation of its resources, it is necessary to provide for the development by the state, regional agencies, counties and cities, including charter cities, of statewide coordinated plans for the conservation and preservation of open-space lands.

(e) That for these reasons this article is necessary for the promotion of the general welfare and for the protection of the public interest in open-space land." (Government Code §66561.)

(g) The State has further shown its concern, interest, and desire to preserve and protect open space by:

(1) Requiring general plans of cities and counties to contain a conservation element.

(2) Broadening the jurisdiction of local planning commissions to include the preservation and conservation of open space land.

(3) Prohibiting the construction of streets or street improvements until the planning commission has reviewed the same as to compliance with open space provisions of the general plan.

(4) Requiring cities to adopt zoning consistent with open space elements of the general plan.

(5) Prohibiting approval of a subdivision map if it is likely to cause substantial environmental damage or substantially and unavoidably injure fish or wildlife or their habitat.

(h) The RPD-1 and 2 zones and the RMP zone permit economically viable uses consistent with the open space preservation necessity outlined above.

Section 2. Amendment.

The public peace, health, safety, welfare, general prosperity and public interest require the amendment of Ordinance No. 9 N.S., the Zoning Ordinance, by amending the Zoning Map to change the classification of certain property lying within the City of Tiburon, from R-1-C, R-P, P, RO-1-C, RO-2-C, RO-1 and RO-2 to RPD-1 and RPD-2, and from R-3 to RMP,

as more fully shown on Exhibit A attached hereto and made a part hereof by reference.

Section 3. Separability.

If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid or unconstitutional by the decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of the ordinance. The City Council of the City of Tiburon hereby declares that it would have passed this ordinance, and each section, subsection, sentence, clause or phrase thereof, irrespective of the fact that any one or more other sections, subsections, sentences, clauses or phrases may be declared invalid or unconstitutional.

Section 4. Effective Date.

This ordinance shall take effect and be in force thirty days after its passage, and before the expiration of fifteen days after its passage, the same shall be published, with the names of the members voting for and against the same, at least once in a newspaper of general circulation published in the City of Tiburon.

PASSED AND ADOPTED at a adjourned meeting of the City Council of the City of Tiburon held on June 28, 1973, by the following vote:

AYES: Councilmen: Aramburu, Fanning, Sennett

NOES: Councilmen: Becker

ABSENT: Councilmen: Littman

S/Branwell Fanning
BRANWELL FANNING
Mayor of the City of Tiburon

ATTEST:
S/Bert Balmer
BERT BALMER, City Manager/Clerk

APPENDIX F.

Selected Sections of the Government Code of the State of California.

§6950. It is the intent of the Legislature in enacting this chapter to provide a means whereby any county or city may acquire, by purchase, gift, grant, bequest, devise, lease or otherwise, and through the expenditure of public funds, the fee or any lesser interest or right in real property in order to preserve, through limitation of their future use, open spaces and areas for public use and enjoyment.

§6951. The Legislature finds that the rapid growth and spread of urban development is encroaching upon, or eliminating, many open areas and spaces of varied size and character, including many having significant scenic or esthetic values, which areas and spaces if preserved and maintained in their present open state would constitute important physical, social, esthetic or economic assets to existing or impending urban and metropolitan development.

§6952. The Legislature hereby declares that it is necessary for sound and proper urban and metropolitan development, and in the public interest of the people of this State for any county or city to expend or advance public funds for, or to accept by, purchase, gift, grant, bequest, devise, lease or otherwise, the fee or any lesser interest or right in real property to acquire, maintain, improve, protect, limit the future use of or otherwise conserve open spaces and areas within their respective jurisdictions.

§6953. The Legislature further declares that the acquisition of interests or rights in real property for the preservation of open spaces and areas constitutes

a public purpose for which public funds may be expended or advanced, and that any county or city may acquire, by purchase, gift, grant, bequest, devise, lease or otherwise, the fee or any lesser interest, development right, easement, covenant or other contractual right necessary to achieve the purpose of this chapter. Any county or city may also acquire the fee to any property for the purpose of conveying or leasing said property back to its original owner or other person under such covenants or other contractual arrangements as will limit the future use of the property in accordance with the purposes of this chapter.

§6954. For the purposes of this chapter an "open space" or "open area" is any space or area characterized by (1) great natural scenic beauty or (2) whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding urban development, or would maintain or enhance the conservation of natural or scenic resources.

§ 65560.

(a) "Local open-space plan" is the open-space element of a county or city general plan adopted by the board or council, either as the local open-space plan or as the interim local open-space plan adopted pursuant to Section 65563.

(b) "Open-space land" is any parcel or area of land or water which is essentially unimproved and devoted to an open-space use as defined in this section, and which is designated on a local, regional or state open-space plan as any of the following:

(1) Open space for the preservation of natural resources including, but not limited to, areas required for the preservation of plant and animal life, including

habitat for fish and wildlife species; areas required for ecologic and other scientific study purposes; rivers, streams, bays and estuaries; and coastal beaches, lakeshores, banks of rivers and streams, and watershed lands.

(2) Open space used for the managed production of resources, including but not limited to, forest lands, rangeland, agricultural lands and areas of economic importance for the production of food or fiber; areas required for recharge of ground water basins; bays, estuaries, marshes, rivers and streams which are important for the management of commercial fisheries; and areas containing major mineral deposits, including those in short supply.

(3) Open space for outdoor recreation, including but not limited to, areas of outstanding scenic, historic and cultural value; areas particularly suited for park and recreation purposes, including access to lakeshores, beaches, and rivers and streams; and areas which serve as links between major recreation and open-space reservations, including utility easements, banks of rivers and streams, trails, and scenic highway corridors.

(4) Open space for public health and safety, including, but not limited to, areas which require special management or regulation because of hazardous or special conditions such as earthquake fault zones, unstable soil areas, flood plains, watersheds, areas presenting high fire risks, areas required for the protection of water quality and water reservoirs and areas required for the protection and enhancement of air quality.

§65561.

The Legislature finds and declares as follows:

(a) That the preservation of open-space land, as defined in this article, is necessary not only for the

maintenance of the economy of the state, but also for the assurance of the continued availability of land for the production of food and fiber, for the enjoyment of scenic beauty, for recreation and for the use of natural resources.

(b) That discouraging premature and unnecessary conversion of open-space land to urban uses is a matter of public interest and will be of benefit to urban dwellers because it will discourage noncontiguous development patterns which unnecessarily increase the costs of community services to community residents.

(c) That the anticipated increase in the population of the state demands that cities, counties, and the state at the earliest possible date make definite plans for the preservation of valuable open-space land and take positive action to carry out such plans by the adoption and strict administration of laws, ordinances, rules and regulations as authorized by this chapter or by other appropriate methods.

(d) That in order to assure that the interests of all its people are met in the orderly growth and development of the state and the preservation and conservation of its resources, it is necessary to provide for the development by the state, regional agencies, counties and cities, including charter cities, of statewide coordinated plans for the conservation and preservation of open-space lands.

(e) That for these reasons this article is necessary for the promotion of the general welfare and for the protection of the public interest in open-space land.

§ 65562.

It is the intent of the Legislature in enacting this article:

(a) To assure that cities and counties recognize that open-space land is a limited and valuable resource which must be conserved wherever possible.

(b) To assure that every city and county will prepare and carry out open-space plans which, along with state and regional open-space plans, will accomplish the objectives of a comprehensive open-space program.

§ 65563.

On or before * * * December 31, 1973, every city and county shall prepare, adopt and submit to the Secretary of the Resources Agency a local open-space plan for the comprehensive and long-range preservation and conservation of open-space land within its jurisdiction. Every city and county shall by August 31, 1972, prepare, adopt and submit to the Secretary of the Resources Agency, an interim open-space plan, which shall be in effect until * * * December 31, 1973, containing, but not limited to, the following:

(a) The officially adopted goals and policies which will guide the preparation and implementation of the open-space plan; and

(b) A program for orderly completion and adoption of the open-space plan by * * * December 31, 1973, including a description of the methods by which open-space resources will be inventoried and conservation measures determined.

§ 65566.

Any action by a county or city by which open-space land or any interest therein is acquired or disposed of or its use restricted or regulated, whether or not pursuant to this part, must be consistent with the local open-space plan.

§ 65567.

No building permit may be issued, no subdivision map approved, and no open-space zoning ordinance adopted, unless the proposed construction, subdivision or ordinance is consistent with the local open-space plan.

§ 65910.

Every city and county by December 31, 1973, shall prepare and adopt an open-space zoning ordinance consistent with the local open-space plan adopted pursuant to Article 10.5 (commencing with Section 65560) of Chapter 3 of this title.

§ 65911.

Variances from the terms of an open-space zoning ordinance shall be granted only when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification.

Any variance granted shall be subject to such conditions as will assure that the adjustment thereby authorized shall not constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and zone in which such property is situated.

This section shall be literally and strictly interpreted and enforced so as to protect the interest of the public in the orderly growth and development of cities and counties and in the preservation and conservation of open-space lands.

§ 65912.

The Legislature hereby finds and declares that this article is not intended, and shall not be construed, as authorizing the city or the county to exercise its power to adopt, amend or repeal an open-space zoning ordinance in a manner which will take or damage private property for public use without the payment of just compensation therefor. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or of the United States.

Supreme Court, U.S.
FILED
OCT 12 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS AND BONNIE G. AGINS,
Appellants,

VS.

CITY OF TIBURON,
Appellee.

Appeal from the Supreme Court of California

BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF JURISDICTIONAL STATEMENT

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BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF JURISDICTIONAL STATEMENT

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 42, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of appellants Donald and Bonnie Agins. Consent to the filing of the brief has been granted by counsel for both parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

The Agins appeal from the decision of the California Supreme Court which holds that they are not entitled to proceed to trial on the issue of whether compensation is required for a total loss of use of their ridgeland property by operation of the City of Tiburon's open space zoning

ordinance. The decision appealed from holds that California property owners faced with oppressive and invalid land use regulation may not seek money damages by way of the inverse condemnation remedy, but may only seek invalidation of the offending regulation. *Agins v. City of Tiburon*, 24 Cal. 3d 266, 276-77 (1979).

Pacific Legal Foundation believes that this decision portends grave consequences to the general public and raises substantial federal questions in that the California court's decision would carve out a significant exception from the protections of the Federal Due Process Clause.

PLF is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for PLF is established by an independent Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The PLF Board has authorized the filing of this brief.

PLF, its members, supporters, and contributors are concerned that the decision of the California Supreme Court in this case poses a serious threat to the integrity of the individual right of property. Amicus takes the position that a California owner whose property becomes subject to unconstitutional regulation cannot effectively protect his rights if he is limited to the remedy prescribed by the California Supreme Court. PLF contends that where a zoning

ordinance effects a "taking" of property within the meaning of the just compensation clause of the Fifth Amendment, invalidation of the ordinance does not vindicate or protect the rights of the property owner. A full measure of protection is afforded only where the inverse condemnation remedy is available. Invalidation frequently has the effect of perpetuating the injury, while damages in inverse condemnation fulfill the guarantee of just compensation. It is the position of amicus that the burden of promoting the public good should not be borne, even if only for an interim period, by a single landowner. To impose such burden would defeat the distributional policy of the Just Compensation Clause.

Amicus does not herein argue the question of what degree of regulation effects an unconstitutional taking. The concern is with preservation of a property right once infringement of the right has been determined in court. A means for real protection of property rights must be available. The right of property must be guarded as is every other right within the penumbra afforded constitutional protection. *See Griswold v. Connecticut*, 381 U.S. 479, 483-84 (1965). "That rights in property are basic civil rights has long been recognized." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). Should the decision of the California Supreme Court be allowed to stand, the rights guaranteed to California citizens by the Federal Constitution will be denied.

Amicus PLF is also concerned with the public policy issues raised by the California Supreme Court's decision. The decision if allowed to stand will have profound effects on the price and availability of adequate housing.

Government regulation in the 1970's has been responsible for a dramatic increase in the price of housing. Numerous studies have documented the inflationary impact of housing regulation.[1] They point out that government policy and regulation have been significant factors responsible not only for the creation of a housing scarcity, which has forced prices to escalate, but also for pronounced reduction in the number of people who can buy new homes.[2]

The California Legislature has recognized the problems incident to the provision of adequate and affordable housing and to that end has mandated that California communities "make adequate provision for the housing needs of all economic segments of the community." Cal. Gov't Code § 65302(c). The *Agins* decision thwarts this policy and the interests of those in search of affordable housing by further increasing the risks associated with the production of housing. Where the provision of housing becomes a high risk undertaking, due to the probability, for example, of delay, lengthy litigation to overturn invalid regulations or arbitrary and capricious governmental action, that risk factor

[1]*See, e.g.*, Urban Land Institute and Gruen Gruen & Associates, *Effects of Regulation on Housing Costs: Two Case Studies*, Washington; Urban Land Institute (1977); and Seidel, S., *Government Regulations and Housing Costs*, Rutgers University Center for Urban Policy Research (1977).

[2]Urban Land Institute, *supra* note 1, at page 1.

In June, 1979, the median price of an *existing* home in California was a record high of $82,094. Average new home prices in the San Francisco area alone in June, 1979, increased to $106,000. Source: Telephone interview, Mr. Joel Singer, California Association of Realtors, Los Angeles, California, July 31, 1979.

The Urban Land Institute and Gruen Gruen & Associates' study points out that "stringent development constraints have resulted in heavy competition for scarce housing and price increases of 25-100 percent per year." Urban Land Institute, *supra* note 1.

is ultimately passed on to the consumer. Economist Paul Samuelson expresses the point as follows:

> "If people generally act like risk averters . . . they will prefer smaller steady incomes to erratic incomes even when those average out to a higher figure. Therefore, economic activities that involve much uncertainty and risk . . . will be forced by comparative entry and exit of risk takers to pay, over the long run, a positive profit premium to compensate for aversion to risk. The yield on capital invested in such industries will involve, in addition to pure interest corresponding to safe investments, an extra element corresponding to positive profit."[3]

The added risk factor discourages entry into the market, reducing competition, and results in less housing at higher prices. The *Agins* decision, creating uncertainty and exacerbating market disequilibrium, adds significantly to a critical housing problem.

The foregoing are the interests and concerns of amicus Pacific Legal Foundation.

OPINION BELOW

The opinion of the California Supreme Court is reported at 24 Cal. 3d 266, 157 Cal. Rptr. 372, 598 P.2d 25 (1979). A copy of the opinion is attached as Appendix A to the Jurisdictional Statement.

[3]Samuelson, *Economics: An Introductory Analysis*, 604 (6th ed. 1964).

STATEMENT OF THE CASE

Amicus curiae adopts the statement of the facts of the case as it appears in the Jurisdictional Statement.

ARGUMENT

I

ELIMINATION OF THE FEDERALLY GUARANTEED MONEY DAMAGES REMEDY BY THE STATE COURT FURTHER ERODES INDIVIDUAL RIGHTS IN PROPERTY NECESSITATING REVIEW BY THIS COURT

For nearly two centuries, American political scientists and legal scholars have pointed to protection of individual property rights as the fundamental motivation for adoption of the Federal Constitution. In keeping with the drafters' intentions, express constitutional restrictions on governmental interference with private property have been augmented by court-made doctrine. Nineteenth century jurists broadly construed the Contract Clause, U.S. Const., art. I, § 10, as a means of protecting vested property rights against unjust state interference. *E.g., Fletcher v. Peck,* 10 U.S. (6 Cranch) 87 (1810); *Trustees of Dartmouth College v. Woodward,* 17 U.S. (4 Wheat.) 518 (1819). Later, this Court turned to the Due Process Clause of the Fifth Amendment as a restriction on economic legislation. *Mugler v. Kansas,* 123 U.S. 623 (1887). This Court has unambiguously indicated that the Fifth Amendment guarantee that private property shall not be taken for public use without just compensation operates as a limitation on the exercise of the police power. *Goldblatt v. Hempstead,* 369 U.S. 590

(1962); *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922). As stated by Justice Holmes:

> "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co.,* 260 U.S. at 415.

Despite the safeguards created by this Court, states and political subdivisions have, during the past 50 years, made disturbing inroads on the institution of private property. Through a multitude of regulatory programs, individual rights in property have been compromised and sometimes totally disregarded. Without question, individual rights in property are held subject to society's right to be assured of public health, safety, and welfare. With the growth of cities and concomitant increase in urban density, public versus private conflicts were inevitable. The notion of which subjects are appropriate for regulation has necessarily expanded. As this Court stated in *Euclid v. Ambler Realty Co.,* 272 U.S. 365, 387 (1926), "In a changing world it is impossible that it should be otherwise."

Although an owner's freedom to use, enjoy, and derive profit from property has been severely diminished, the individual whose property interests have been subject to regulation which goes "too far" has not been without an effective remedy. Federal and state courts have recognized that an action in inverse condemnation will lie to challenge unjust legislation. *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1979); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* ..... U.S. ....., 59 L. Ed. 2d 401 (1979); *Gordon v. City of Warren,* 579 F.2d 386 (6th Cir. 1978); *Dahl v. City of Palo Alto,* 372 F. Supp.

647 (N.D. Cal. 1974); *Fred F. French Investing Co. v. City of New York*, 39 N.Y.2d 587, 350 N.E.2d 381 (1976).

Prior to the California Supreme Court's decision in this case, inverse condemnation was also available to relieve California property owners of the burdens of unconstitutional restrictions.[4] Now, however, the California court would deprive California property owners of this remedy, the continued availability of which is fundamental to the protection of individual rights in property.

By its decision in this case, the court limits the use of inverse condemnation to those cases in which government "takes" private property by physical invasion. To draw this distinction between physical taking of property and denial of substantially all use thereof is to reject universally accepted notions of the concept of property. It is ironic that the *Agins* majority cites this Court's clear definition of "property" which appears in *United States v. General Motors Corp.*, 323 U.S. 373 (1945); *Agins v. City of Tiburon*, 24 Cal. 3d at 273. As it is used in the Just Compensation Clause of the Fifth Amendment, "property" denotes "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it.

[4]See *San Diego Gas & Electric Co. v. City of San Diego*, 81 Cal. App. 3d 844 (1978), hearing granted July 13, 1978, cause retransferred to Court of Appeal, Fourth District, June 14, 1979, for reconsideration in light of *Agins; Eldridge v. City of Palo Alto*, 57 Cal. App. 3d 613 (1976). Both cited cases expressly recognized inverse condemnation as a remedy for regulation which effects an unconstitutional taking. *Eldridge* was specifically disapproved in *Agins*. *Agins v. City of Tiburon*, 24 Cal. 3d 266, 273 (1979).

. . . In other words, it deals with . . . the individuals' 'interest' in the thing in question. That interest may comprise the group of rights for which the shorthand term is 'a fee simple,' or it may be a [lesser interest]. . . . *The constitutional provision is addressed to every sort of interest the citizen may possess." United States v. General Motors Corp.*, 323 U.S. at 377-78 (emphasis added).

Amicus believes that a citizen should be entitled to money damages when the government appropriates his interest in the *use* of his property, even if only for a temporary period, as well as when it takes his interest in *physical possession*. Right of user is one of the most important and fundamental of the bundle of rights associated with the ownership of property.

> "The modern prevailing view is that any substantial interference with private property which destroys or lessens its value (or by which the owner's right to its use or enjoyment is in any substantial degree abridged or destroyed) is, in fact and in law, a 'taking' in the constitutional sense, to the extent of the damages suffered, even though the title and possession of the owner remains undisturbed." *2 Nichols on Eminent Domain* (3d rev. ed. 1975), Section 6.13 at 6-65. *Accord, United States v. General Motors Corp.*, 323 U.S. at 378.

The distinction drawn by the California court between physical appropriation and an unlawful appropriation of a right of use as regards the right to money damages is one that has neither been accepted by this Court, nor should be. To do so is to drastically modify fundamental concepts of property.

II

THE REMEDY OF INVALIDATION IS WHOLLY INADEQUATE WHEN CONSIDERED IN THE LIGHT OF PRINCIPLES OF EQUITY AND FAIRNESS

The California Supreme Court has concluded that an aggrieved landowner's sole remedy is to seek invalidation of a government regulation when a public agency has adopted a regulation which substantially limits the use of his property. *Agins v. City of Tiburon,* 24 Cal. 3d at 269-70. Amicus strongly urges that there is no real relief provided by this remedy. It is illusory at best and in practice actually perpetuates the injury imposed by the invalidated ordinance.

A. Invalidation Returns the Problem to the Entity Which Caused It in the First Place

It is fair to presume that the public objective which has been thwarted by invalidation of the ordinance enacted for its achievement remains desirable. Thus, it is likely that a public agency will pursue the objective through enactment of still another ordinance. The landowner who has won "relief" from the first ordinance will be burdened anew, albeit to a greater or lesser extent. There is the possibility that the agency may decide to exercise its power of eminent domain, but as discussed below, that is unlikely.

It is fundamental to our system of government that courts must defer as much as possible to legislative judgments concerning the manner in which public objectives will be achieved. But legislatures have a concomitant duty to avoid unfairness and to assess the constitutionality of their actions independent of what the courts may require.

Tribe, *American Constitutional Law,* Section 5.1 at 224 (1978). Unfortunately, lawmakers have frequently failed to fulfill these responsibilities in the area of land use regulation. The question of constitutionality is often given to the court without much consideration by the municipality. One commentator cites this as a major flaw in the invalidation remedy. Berger, M., *To Regulate or Not To Regulate—Is that the Question?,* 8 Loy. L.A.L. Rev. 253 (1975).

The *Agins* decreed remedy thus can have devastating practical effects on the property owner. While attempted resolution of the controversy bounces from court to city council and back again, the landowner is deprived of the fruitful use of his property. In this regard it should be noted that while the court may enjoin enforcement of the unconstitutional ordinance, the municipality may retaliate pursuant to California Government Code § 65858 and enact a moratorium pending reconsideration of the challenged ordinance for up to two years. This renders the invalidation remedy all the more ineffectual against arbitrary and capricious action.

Where, as here, the public objective is open space preservation, benefits accrue to the public during the course of this process. For this public *use* of his land, the landowner will receive *no* compensation if invalidation is his sole remedy.[5] This is patently violative of the constitutional guarantee of just compensation.

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[5]In *Eldridge v. City of Palo Alto,* 57 Cal. App. 3d 613 (1976), defendant city initiated severely restrictive measures on plaintiffs' land in 1969 with a development moratorium imposed pending completion of land use studies. The moratorium was extended twice while the city examined "the open-space problems." In 1972, the city announced the allocation of funds for purchase of plaintiffs' land. Shortly thereafter, their land was designated in the general (continued)

Thus, under the rule established in this case by the California Supreme Court, municipalities will have the freedom to attain their land use goals without the expenditure of public funds. In the era of Proposition 13, California's property tax limitation initiative, it is a certainty that local entities will fully exercise this new freedom. Although the public may cheaply acquire valuable benefits, it will do so only at great expense to individual property owners, sacrificing them to the public good.

B. Invalidation Does Not Achieve the Cost Distribution Objective of the Just Compensation Clause

The cost distribution objective of the Just Compensation Clause have long been upheld by this Court. This Court pointed out that:

> "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960).

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plan for open space, while the city announced it was exploring how to best use the "open-space funds." It then authorized the purchase of some open space lands. Nevertheless, plaintiffs' land was zoned for open space. Opening Brief for Appellant, Donald F. Eldridge, at 32-40. Suit was instituted in 1973 seeking damages in inverse condemnation. Defendants' demurrer to the complaint was sustained by the trial court, but on appeal in 1976, that decision was reversed. The appellate court held that a cause of action in inverse condemnation had been stated. By then, seven years had passed during which plaintiffs' use of their property had been effectively frozen and the public enjoyed the benefits of open space at the expense of the landowners. The *Agins* court subsequently disapproved the *Eldridge* decision. *Agins,* 24 Cal. 3d at 273. All those property owners similarly situated to *Eldridge* are thus without any effective remedy to defend against even the most egregious of municipal conduct.

In the aftermath of litigation resulting in invalidation, it is safe to assume that the objectives embodied in the challenged ordinance will be achieved nonetheless. During that period and the preceding period of the ordinance's legal effectiveness, the impacted landowner is shouldering a burden which should be borne by the community as a whole. Even at the moment the court concludes that the landowner is paying more than his fair share and for that reason invalidates the ordinance, the inequity continues. Thus, invalidation does not provide the protection which is the basis for the just compensation guarantee. There is a total failure to distribute the loss.

This is to be contrasted with the remedy of inverse condemnation. Under that remedy, the burden of providing a public benefit or preserving a public resource would not be borne exclusively by the individual property owner. The cost of providing such benefits would be distributed equitably among the ultimate beneficiaries of the regulation, the entire community.

III

THE PUBLIC POLICY CONCERNS OF THE CALIFORNIA SUPREME COURT ARE INSUBSTANTIAL

The *Agins* majority indicated that in reaching its decision it was persuaded by "the need for preserving a degree of freedom in the land-use planning function and the inhibiting financial force which inheres in the inverse condemnation remedy." *Agins v. City of Tiburon,* 24 Cal. 3d at 276-77. Amicus submits that these concerns, even if well founded, cannot be allowed to circumscribe federally guaranteed constitutional rights. The concerns, however, are

not well founded. Indeed, considerations of effective planning and economic impact counsel in favor of an opposite result.

A. The Availability of an Inverse Condemnation Remedy Will Not Adversely Affect the Planning Process

The California court concluded that an inverse condemnation remedy would detrimentally restrict local planners in the performance of their duties.

The creativity of planners would in no way be inhibited by the threat of damage awards based on unconstitutional regulation. It is their function to develop workable means for the achievement of legitimate public objectives. The availability of the inverse condemnation remedy helps to define the parameters of responsible action and guards against violating those limitations established by the Federal Constitution.

The availability of the inverse condemnation remedy would benefit the land use planning process. Unlike invalidation, this remedy preserves the integrity of a comprehensive plan in the event a component zoning ordinance is successfully challenged. When an ordinance is invalidated, the continued viability of the entire planning scheme, of which the ordinance was a part, is called into question. By upsetting a zoning ordinance on the basis of its application to one parcel, the comprehensiveness of a regional plan is destroyed. It is contrary to good common sense to invalidate an otherwise valid and beneficial regulation which imposes hardship on only one (or a few) individual(s) when the hardship can be alleviated through the payment of damages. In fact, it has been suggested that "[t]he

criteria for determining whether to allow an award should be whether it would upset an entire regulatory scheme to invalidate the statute." *Comment: An Evaluation of the Rights and Remedies of a New York Landowner for Losses Due to Government Action—With a Proposal for Reform,* 33 Albany L. Rev. 537, 550 (1969).

B. The Perceived Threat of Fiscal Harm Cannot Justify Abrogation of Constitutional Rights

The California court's opinion reflects an overriding concern for the impact on the public fisc and an insensitivity to the impact on the property owner of the court's preferred remedy, invalidation. This attitude underscores an improper approach to adjudication involving the just compensation guarantee. The court may not cause the strength of the Just Compensation Clause of the Federal Constitution to ebb and flow with the changing conditions of government or societal preference. This Court has indicated that the economic impact of regulation on the claimant is of "particular significance" in resolving controversies arising under the Just Compensation Clause. *Penn. Central,* 438 U.S. at 124. The California court ignored this significant factor.

Damage awards for regulatory takings might, in some cases, impose financial hardship on municipalities, but that alone cannot justify the denial of constitutional protection to the individual landowner. "If there are such liabilities to government, there must be staggering losses

to private owners."[6] The costs of education, welfare, health services, transportation, and other services heavily burden local governments. Provision of open space and allocation of land use in general should not be treated differently. "Interfering with the individual rights of a few property owners will not solve the financial crises of our state and local governments."[7] In this connection, "it would appear that any measure which society cannot afford or, putting it another way, is unwilling to finance under conditions of full compensation, society cannot afford at all."[8] As Justice Holmes warned in *Pennsylvania Coal Co. v. Mahon:*

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co.*, 260 U.S. at 416.

CONCLUSION

The decision of the California Supreme Court has placed in jeopardy the fundamental constitutional right of property. This is a right of individual liberty. *Lynch v. Household Finance Corp.*, 405 U.S. at 552. The availability of a remedy in inverse condemnation to challenge regulatory action is essential to the protection of that right and the liberties which flow from the exercise of the right. The right to receive just compensation for private property

[6]Hagman D., Misczynski, D., *Windfalls for Wipeouts: Land Value Capture and Compensations*, 297 (1978).

[7]Badler, "Municipal Zoning Liability in Damages—A New Cause of Action," 5 Urban Law. 25, 44 (1973).

[8]Michelman, "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law," 80 Harv. L. Rev. 1165, 1181 (1967).

taken for a public use, whether it be open space preservation or another purpose, has long been heralded as an essential protection against governmental abuse and discrimination. *United States v. Gettysburg Electric Railway Co.*, 160 U.S. 668, 680 (1896). It was in the *Pennsylvania Coal Co.* case that Justice Holmes observed that the Just Compensation Clause protects against the destruction of private property resulting from the unlimited exercise of the police power. Neither the interests in immunizing communities from financial liability nor the circumstances brought upon municipalities by California's tax limitation initiative can warrant abrogation of that constitutional guarantee.

For the foregoing reasons amicus curiae Pacific Legal Foundation respectfully urges that probable jurisdiction be noted.

Respectfully submitted,

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October, 1979

Supreme Court, U. S.
FILED
OCT 22 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS AND BONNIE G. AGINS,
Appellants

v.

CITY OF TIBURON,
Appellee

On Appeal From The Supreme Court Of California

BRIEF AMICI CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE CALIFORNIA BUILDING INDUSTRY ASSOCIATION IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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October 1979

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Amici have received the written consent of the parties to the case to file this brief. Amici adopt appellants' statements of Opinion Below, Jurisdiction, and the Case.

INTEREST OF AMICI

The National Association of Home Builders represents approximately 120,000 builder and associate members organized in 743 affiliated state and local associations in the fifty states, District of Columbia, and Puerto Rico. Its members include not only people and companies that construct and supply single-family homes but also apartment, condominium, commercial, and industrial builders, as well as land developers and remodelers. The affiliated California Building Industry Association, composed of six regional and twenty local associations, has approximately 5,000 members that produce about seventy percent of the state's housing. The Associations' fervent interest in a just and fair approach to government use of private land, until now protected ultimately by the Constitution, will be severely affected if the decision of the court below is not reversed.

CONSTITUTIONAL PROVISIONS INVOLVED

Article six of the United States Constitution provides in pertinent part: "This Constitution . . . shall be the supreme law of the land; and the judges in every State shall be bound thereby. . . ."

The fifth amendment to the Constitution provides in pertinent part: ". . . nor shall private property be taken for public use, without just compensation."

The fourteenth amendment provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

QUESTION PRESENTED

Whether a state court can rule out the right of property owners to file compensatory taking, or inverse condemnation, actions in direct contravention of the United States Constitution and Supreme Court rulings thereunder.

ARGUMENT

I. The Decision of the Court Below Effectively Destroys the Right To Make a Compensatory De Facto Taking Claim Despite the Just Compensation Clause and Rulings of This Court.

In a sweeping and unprecedented policy decision that goes far beyond the circumstances of the particular case, the lower court has declared that henceforth no one may *bring a claim* under the United States and California Constitutions for inverse condemnation damages, that is, allege a de facto taking of private property by police power action without just compensation. The fifth amendment, made applicable to the states through the fourteenth amendment (*Chicago, B.&Q.R.R.* v. *City of Chicago*, 166 U.S. 226 (1897)), prohibits not only the deprivation of property without due process of law but also, in a separate clause, the taking of property without just compensation.

By ruling that an aggrieved plaintiff may only make a claim for equitable relief, rather than a claim for damages, the lower court has effectively merged the Constitution's due process and just compensation clauses so as to preclude any claim under the latter. Aside from the violence this does to the words and meaning of the fifth amendment, it makes for irrational and unfair land use policy because a govern-

ment regulation could be legally valid, not justifying a declaratory, injunctive, or mandamus remedy, yet at the same time so harsh as to deny a person all reasonable use of his land, thereby justifying the inverse condemnation remedy (of course, a regulation could also be invalid and a taking as well.)[1] A further effect of the lower court's decision is to shift to California's federal courts all regulatory land use cases in which an allegation of unconstitutional taking without just compensation is made, thus increasing the federal judiciary's land use law caseload, a field traditionally left to the state courts.

Professor Williams summed it up best in his landmark treatise when he recognized that inverse condemnation[2] "can play a useful role as part of an overall

[1]For the importance as to remedy in the fifth amendment's distinction between deprivation and taking, *see* Comment, *Balancing Private Loss Against Public Gain To Test for a Violation of Due Process or a Taking Without Just Compensation*, 54 Wash. L. Rev. 315, 319-27 (1979); D. Godschalk, et al., Constitutional Issues of Growth Management 53-64 (1977); D. Mandelker, Managing Our Urban Environment 624 (2d ed. 1971); Dunham, *From Rural Enclosure to Re-Enclosure of Urban Land*, 35 N.Y.U.L. Rev. 1238, 1253-54 (1960).

[2] Defined as "the popular description of a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *Thornburg* v. *Port of Portland*, 233 Or. 178, 180 n.1, 376 P.2d 100, 101 n.1 (1962); *City of Jacksonville* v. *Schumann*, 167 So.2d 95, 98 (1st D.C.A. Fla. 1964), *cert. denied*, 172 So.2d 597 (Fla. 1965), *cert. denied*, 390 U.S. 981 (1968) (takings found in airplane overflight cases); 11 E. McQuillin, The Law of Municipal Corporations § 32.132a (3d ed. rev. 1977). More simply, "inverse condemnation" has been described as an action "to redress a taking without compensation." *Sixth Camden Corp.* v. *Township of Evesham*, 420 F. Supp. 709, 721 (D.N.J. 1976).

land use regulation system, to provide some protection for landowners against de facto takings." 5 N. Williams, American Planning Law—Land Use and the Police Power § 159.18 (1975). More to the point, this Court as recently as last term acknowledged in a legislative immunity case the *constitutional right to file* an "inverse condemnation" action, ruling further that this was not the occasion to review the circuit court's holding that a violation of the due process clause had been adequately alleged, in which appellants had claimed that an improper exercise of the police power had led to a "taking" or an "inverse condemnation." *Lake Country Estates* v. *Tahoe Regional Planning Agency*, 99 S. Ct. 1171, 1174, 1175 n.11 (1979); *see Jacobson* v. *Tahoe Regional Planning Agency*, 566 F.2d 1353 (9th Cir. 1977).

What this Court acknowledged as constitutionally allegable on March 5, 1979, the *Agins* court read abruptly out of the Constitution nine days later.

Lake Country Estates is the tip of an iceberg of Supreme Court taking cases stretching back a century. The first notable such case, *Pumpelly* v. *Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871), found a compensable taking when flooding effectively destroyed a property's usefulness despite the absence of an actual appropriation for public use. It exemplifies the simplest type of inverse taking, that of physical invasion. *Pumpelly* also provides a vivid illustration of the essence of inverse condemnation (a phrase that gained prominence in the 1960's)—the transmutation of police power exercise or regulation into an exercise of compensable taking. As explained in 2 P. Nichols, The Law of Eminent Domain § 6.1[1] (3d ed. rev. 1976):

> Any limitation on the free use and enjoyment of property constitutes a *taking* of property within the meaning of the *constitutional provision*. It is sufficient that the person claiming *compensation* has some right or privilege in the appropriated property, which right or privilege is destroyed, injured or abridged by such appropriation . . . .
>
> *Constitutional rights rest on substance, not on form*, and the liability to pay compensation for property taken cannot be evaded by leaving the title in the owner, while depriving him of the beneficial use of the property. It has already been shown that a legal restriction upon the use of land may constitute a taking, *although the title is unaffected and the land is physically untouched*, and the same is true when the owner's enjoyment of the land is physically interfered with although his legal rights remain unimpaired. (emphasis added).

A half century after *Pumpelly*, the philosophical underpinning of inverse condemnation gained its fullest expression in the "leading"[3] taking case of *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922). Justice Holmes framed the question of the case as "whether the police power can be stretched so far"[4] and went on to hold *not* when "the extent of the taking is great."[5] Hence it has for years been strongly held that alleged abuse of the police power can be remedied, where proven appropriate, by constitutional just compensation. Equally important for purposes of this appeal, the *right to file* and attempt to prove such a claim is obviously implicit in the Court's result.

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[3] *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 127 (1978).

[4] 260 U.S. at 413.

[5] 260 U.S. at 414.

> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. [cite omitted]. When this seemingly absolute protection is found to be *qualified by the police power, the natural tendency of human nature is to extend the qualification more and more* until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.
>
> *The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . .* We are in danger of forgetting that *a strong public desire to improve the public condition is not enough* to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions. 260 U.S. at 415-16 (emphasis added).

The *Agins* court plainly succumbed to that "natural tendency of human nature." Instead of determining if a specific case for inverse condemnation had been adequately made out, the court merely acknowledged the public value of land use planning and execution ("to improve the public condition") and then inexplicably placed that value forever above the Constitution's just compensation clause.

It is legal and social folly to strive for worthy environmental improvement (with the Agins, the city deemed their property desirable as open space for its scenic view of San Francisco Bay) by simplistically pitting the taking question as "police power" versus "eminent domain power."

> There is an almost *irresistable urge* in this matter to think of the question in terms of police power versus eminent domain—as if the choice of means for working for environmental improvement had to be either one or the other. The process of choosing means for implementing policy goals for environmental improvement thus tends to start with the premise that public agencies should first see how far they can go in requiring landowners to submit to regulatory controls of land use, and resort to eminent domain techniques only where the courts compel them to compensate landowners for a "taking" of property. Netherton, *Implementation of Land Use Policy: Police Power vs. Eminent Domain*, 3 Land & Water L. Rev. 33, 50 (1968) (emphasis added).

Netherton, explaining that the either/or approach is an unfair and unwise way to protect the community environment, argues for the judicious approach in the "gray areas between those situations where it is obvious that police power should be used and those where it is not so obvious":

> During the period of experimental regulation the landowner's interest can be protected by recourse to an action in *inverse condemnation* where he can sustain the burden of proving damages. Netherton at 55 (emphasis added).

Yielding to the "irresistable urge," the court below, despite explicit constitutional provisions against takings[6] and countless judicial rulings thereunder, has

[6] The California Constitution's just compensation clause is technically broader than that of the United States Constitution. It reads: "Private property may be taken or damaged for public use only when just compensation . . . has first been paid to . . . the owner." Cal. Const. art. 1, § 19. Half the states have "damaged" provisions in their constitutions (all fifty have just compensation clauses, which have been interpreted as substantially the same as the federal clause, with or without the "damaging" language). Note, *Inverse Condemnation: The Case for Diminution in Property Value as Compensable Damage*, 28 Stan. L. Rev. 779, 779 n.2 (1976).

created an illusory distinction that, in practice, renders inverse condemnation suits nugatory in California courts. As Professor Waite, who supports *Pennsylvania Coal's* "diminution of property value" test as one way of judging when police power regulation becomes compensable, said:

> Today it is hard to justify the different compensation philosophies applied to landowners in eminent domain and police power matters . . . . [R]emembering property to be a bundle of rights, it is clear this distinction, too, is illusory. The *substantive* content of title is largely rights of use, and in *both* situations a transfer has occurred . . . Waite, *Governmental Power and Private Property*, 16 Cath. U.L. Rev. 283, 292 (1967) (emphasis added).

This distinction without a difference in the taking context,[7] implicit in *Pennsylvania Coal* and taking cases since, is perhaps most forcefully explicated by the Texas courts. In *San Antonio River Authority* v. *Garrett Brothers*, 528 S.W.2d 266, 273 (Tex. Civ. App. 1975), where a compensable "temporary taking" was found in a city's refusal to issue utility permits for land the city might later acquire, the court explained:

[7] *See* Berger, *To Regulate, Or Not to Regulate—Is That the Question? Reflections on the Supposed Dilemma Between Environmental Protection and Private Property Rights*, 8 Loy. L.A.L. Rev. 253, 268-75 (1975); Beuscher, *Some Tentative Notes on the Integration of Police Power and Eminent Domain By the Courts: So-Called Inverse or Reverse Condemnation*, 1968 Urb. L. Ann. 1, 4.

> If there is a taking the constitution requires payment, even though the taking be for the purpose of promoting the public health, safety, morals or welfare and, therefore, involves an exercise of the police power. [cites omitted]. *The empty formalism of "police power" cannot be made the basis for denying compensation*, and the Texas Supreme Court has expressly refused to "compartmentalize an exercise of sovereignty as either police power or eminent domain for the resolution of [taking] problems arising under [the state constitution]." (emphasis added).[8]

It is one thing to review the facts and circumstances of a case and then to reject its claims as improvidently made. It is quite another matter, however, to decide for expedient reasons that a constitutional cause of action can no longer even be raised under any circumstances for fear that it may disrupt the regular flow of governmental land use decisions. Until the *Agins* opinion, the just compensation clause has never been treated by any court as sheerly precatory language.

[8] In a later case for "inverse condemnation" damages, where a city denied a development permit in order to gain a scenic easement for the public, the court stated:

> [T]here is really no distinction between the powers of eminent domain and an exercising of the police power, when a person's property is taken or the use of same damaged by the state (or city). A person's property may not be taken or damaged as an incident to the exercise of the police power without the payment of compensation. *City of Austin* v. *Teague*, 556 S.W.2d 400, 403 (Tex. Civ. App. 1977).

The state supreme court reversed on other grounds and remanded for retrial of the amount of damages and noted:

> The labels are not helpful. These two doctrines — police power and eminent domain — *merge at so many places when applied to specific problems*, that the legal battlefields have been variously termed a "sophistic Miltonian Serbonian Bog," . . . a "crazy-quilt pattern," . . . "the manifest illusoriness of distinctions," . . . . 570 S.W. 2d 389, 391 (Tex. 1978) (emphasis added).

II. The Decision of the Court Below Is Manifestly Contrary to the Case-By-Case Review Required by the Just Compensation Clause and Rulings of This Court.

The constitutional dilemma peremptorily sworn off by the *Agins* court was specifically addressed by this Court in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). A classic taking case, the issue was whether application of a regulatory land use ordinance resulted in a "temporary taking" of property without just compensation in violation of the fifth and fourteenth amendments. 438 U.S. at 107, 119. While *Penn Central* acknowledged the high burden of proving a taking and, under the facts of the case, found no taking had occurred, *its comprehensive analysis upholds the constitutional right to make the claim and attempt to prove it under law*. This becomes absolutely fundamental because taking questions are "essentially ad hoc, factual inquiries" with no "set formula" to guide a court since the very question of a taking "depends largely upon the particular circumstances" of each case. 438 U.S. at 124.

Save for the erratic *Agins* opinion, the necessity of case-by-case constitutional analysis has been uniformly emphasized by courts and commentators alike. Again, Justice Holmes sets the framework in *Pennsylvania Coal*:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed

under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. *So the question depends on the particular facts . . . . [I]t always is open to interested parties to contend that the legislature has gone beyond its constitutional power.* 260 U.S. at 413 (emphasis added).

In *Berman* v. *Parker*, 348 U.S. 26, 32 (1954), in which a property owner alleged that a land use plan for urban renewal violated both the fifth amendment's due process and just compensation clauses as applied to his land, Justice Douglas said without reservation:

> We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, *for each case must turn on its own facts.* (emphasis added) (*accord, e.g., Armstrong* v. *United States*, 364 U.S. 40, 48 (1960)).

And the Court in *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594 (1962), in upholding an ordinance that prevented further mining by appellant, firmly noted:

> This is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation. [cited omitted]. *There is no set formula to determine where regulation ends and taking begins.* (emphasis added).

Doubtlessly, then, case-by-case determinations of whether land use controls result in compensable takings must be made. 1 R. Anderson, American Law of Zoning § 3.25 (2d ed. 1976); 11 E. McQuillin, The

Law of Municipal Corporations § 32.26 (3d ed. rev. 1977); 2 P. Nichols, *supra*, at § 6.3; 1 A. Rathkopf, Law of Planning and Zoning § 6.02 (4th ed. 1978); 2 P. Rohan, Zoning and Land Use Controls § 7.03[3][d] (1978); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. Cal. L. Rev. 1, 13-48 (1970); Waite, *supra*, at 289. Otherwise, the very words of the just compensation clause ring hollow. "The issue of regulation as against taking is always a matter of degree." *Morris County Land Improvement Co.* v. *Township of Parsippany - Troy Hills*, 40 N.J. 539, 193 A.2d 232, 241 (1963); *accord, e.g., Donohoe Construction Co.* v. *Montgomery County Council*, 567 F.2d 603, 608 n.13 (4th Cir. 1977); *Dahl* v. *City of Palo Alto*, 372 F. Supp. 647, 648 (N.D. Cal. 1974); *Brecciaroli* v. *Connecticut Commissioner of Environmental Protection*, 168 Conn. 349, 362 A.2d 948, 951-52 (1975); *Bureau of Mines* v. *George's Creek Coal and Land Co.*, 272 Md. 143, 321 A.2d 748 (1974); *Commissioner of Natural Resources* v. *S. Volpe & Co.*, 349 Mass. 104, 206 N.E.2d 666, 669-70 (1965); *Aronson* v. *Town of Sharon*, 346 Mass. 598, 195 N.E.2d 341, 345 (1964); *Penn Central Transportation Co.* v. *New York City*, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), *aff'd*, 438 U.S. 104 (1978); *City of Austin* v. *Teague*, 570 S.W.2d 389, 393 (Tex. 1978).

The ineluctable logic and reasonableness of what the law has been is reflected in what the law should be as well. The American Law Institute advocates that:

> The particular circumstances of *each case* must be examined to see on which side of the regulation/taking line it falls. [cites omitted].

> This Code authorizes the payment of compensation in those cases in which the agency feels that the elimination of existing uses would impose too great a burden on the property owner. (§5-102). The Code makes no attempt to define the conditions under which compensation *must* [emphasis in original] be paid. *This is a basic constitutional issue that can be left to case-by-case decision* . . . . Under this Code a landowner who convinces a court that a regulation is unconstitutionally restrictive *may obtain compensation* or a declaration of the regulation's invalidity. (§9-111). ALI Model Land Development Code 155-56 (1976) (emphasis added).

Thus inverse condemnation actions clearly form an organic and inseparable part of the fifth and fourteenth amendments. The "authority is overwhelming" that confiscatory regulation gives rise to such relief.[9] Indeed, de facto taking claims have become so commonplace in American legal theory that courts have developed four sometimes overlapping approaches for supporting an award of damages for an unconstitutional taking of property. D. Godschalk, et al., Constitutional Issues of Growth Management 53-64 (1977); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1183-1201 (1967); Sax, *Takings, Private Property and Public Rights*, 81 Yale L.J. 149, 151 (1971); *Developments in the Law—Zoning*, 91 Harv. L. Rev. 1427, 1462-1501 (1978). These approaches, or tests, are generally referred to as those for:

[9] Berger, *supra* note 7, at 279. Professor Dunham, in a seminal article, reasons that the inverse condemnation remedy would check arbitrary land use regulation by striking a constitutional balance between public gain and private cost. Dunham, *supra* note 1. In addition to Berger and Dunham, two other noted land use law professors provide lucid discussions of the social need, as well as constitutional requirement, for compensatory regulation via the inverse condemnation remedy. *See* Beuscher, *supra* note 7; Hagman, *Compensable Regulation: A Way of Dealing with Wipeouts from Land Use Controls?*, 54 U. Det. J. Urb. L. 45 (1976).

1) *physical invasion* — the elementary approach, represented by *Pumpelly* and *Griggs v. Allegheny County*, 369 U.S. 84 (1962) (airplane overflight case); but as stated in *Penn Central*, "we do not embrace the proposition that a 'taking' can never occur unless government has transferred physical control over a portion of a parcel." 438 U.S. at 123 n.25;

2) *diminution of value* — the approach exemplified by *Pennsylvania Coal*, in which a regulation that causes an excessive decline in a property's market value effects a taking;

3) *nuisance abatement* — if a regulation prevents a harm (abates a nuisance) no compensable taking occurs, but if it confers a benefit on the public then damages are awarded; this test, formulated in E. Freund, The Police Power §511 (1904), finds examples in the *Agins*-like *Dahl*, *supra* (rezoning property to open space in order to avoid cost of acquisition gives rise to constitutional "inverse condemnation" action), and *State* v. *Griggs*, 89 Ariz. 70, 358 P.2d 174 (1960) (a regulation that saves government money rather than protects the public health or safety from an injurious use of land is an unconstitutional taking without compensation; *cf. Cardon Oil Co.* v. *City of Phoenix*, 122 Ariz. 102, 593 P.2d 656 (1979)); and,

4) *balancing of interests* — the broadest test, this weighs the public good against private detriment, considering such factors as a regulation's duration and impact on use of land, the harm sought to be cured, and whether objective studies support the need and scope of the regulation; its essence, as Professor Michelman would emphasize, is that of "fairness" (*see, e.g., Brecciaroli, supra,* and *Village of Willoughby Hills* v. *Corrigan,* 29 Ohio St.2d 39, 278 N.E.2d 658 (1972)).

The stunningly absolutist approach adopted by the lower court, however, patently denies any constitutional analysis and thereby begs the taking question before it can be rightfully posed. Since the 1960's, land use law has become far more than planning, zoning, subdivision, and urban renewal, and now encompasses more complex issues of environmental regulation, historic preservation, transfers of development rights, growth management, and all facets of how land is to be used, developed, and controlled, balancing private rights with public needs. Turning the salient constitutional issue of differing applications of land use regulation into an either/or contest unnecessarily belittles both the Constitution and conservation. As the Supreme Judicial Court of Massachusetts so presciently observed:

> The [government] argue[s] as though all that need be done is to demonstrate a public purpose and then no regulation in the interests of conservation can be too extreme. . . An unrecognized taking in the guise of regulation is worse than confiscation. . .
>
> In this conflict between the ecological and the constitutional, *it is plain that neither is to be consumed by the other. Commissioner of Natural Resources* v. *S. Volpe & Co.*, 349 Mass. 104, 206 N.E.2d 666, 671 (1965) (emphasis added).

Compensatory takings thus occur primarily in two critical situations: whenever a zoning ordinance precludes reasonable use of a property, and whenever a government places an undue and uncompensated burden on an individual landowner in order to achieve a public good. 1 A. Rathkopf, *supra. Agins,* on its face, includes classic taking issue elements:[10] a report prepared for the city as part of its planning process noting the suitability for acquisition of the Agins' property for open space, the rezoning of the property to a lower density called "residential planned development and open space zone," and the filing, then subsequent abandonment, of an eminent domain action against the property. Compensatory takings in the land use context have been found or permissibly alleged time after time in cases with elements such as these. Well known examples from across the nation include:

Zoning — Sixth Camden Corp. v. *Township of Evesham,* 420 F. Supp. 709 (D.N.J. 1976) (inverse con-

[10] The issue raised by this appeal certainly is not limited to cases that never reach the trial stage but nonetheless make the requisite taking allegations. A parallel appeal will shortly be filed in this Court in which, after trial, an inverse taking was found and affirmed and damages awarded (*San Diego Gas & Electric Co.* v. *City of San Diego*, 81 Cal. App. 3d 844, 146 Cal. Rptr. 103 (1978)); on appeal, the state supreme court retransferred the case back to the lower appellate court in light of the *Agins* opinion, and the appellate court then reversed its prior decision. No. 16277 (4th D.C.A. Cal., June 26, 1979), hearing denied, Cal. Sup. Ct., Aug. 22, 1979. The *San Diego* case, like *Agins*, involved downzoning and adoption of an open space element in a general plan.

demnation action under fifth and fourteenth amendments); *Dahl, supra* (inverse condemnation, open space rezoning); *Klopping* v. *City of Whittier*, 8 Cal.3d 39, 500 P.2d 1354, 104 Cal. Rptr. 1 (1972) (inverse condemnation); *Petersen* v. *City of Decorah*, 259 N.W.2d 553 (Iowa App. 1977); *Aronson, supra; Morris County Land Improvement Co., supra* (to keep land in substantially natural state); *Village of Willoughby Hills, supra;*

Subdivision, development – Hotel Coamo Springs, Inc. v. *Hernandez Colon*, 426 F. Supp. 664 (D.P.R. 1976); *Lomarch Corp.* v. *Englewood*, 51 N.J. 108, 237 A.2d 881 (1968) ("temporary taking"); *City of Austin* v. *Teague*, 570 S.W.2d 389 (Tex. 1978) (inverse condemnation, denial of permit to gain scenic easement); *San Antonio River Authority, supra* ("temporary taking");

Planning – Washington Market Enterprises, Inc. v. *City of Trenton*, 68 N.J. 107, 343 A.2 408 (1975);

Police power combinations – Donohoe Construction Co., supra (planning, zoning, subdivision, building permit actions); *Sanfilippo* v. *County of Santa Cruz*, 415 F. Supp. 1340 (N.D. Cal. 1976) (inverse condemnation, planning and zoning); *Peacock* v. *County of Sacramento*, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969) (inverse condemnation, planning, zoning, and subdivision actions);

Other police power regulations – Pete v. *United States*, 209 Ct. Cl. 270, 531 F.2d 1018 (1976) (inverse condemnation, ban of barges within federal park to maintain natural state); *Bydlon* v. *United States*, 146 Ct. Cl. 764, 175 F. Supp. 891 (1959) (ban of low-level

air travel over national forest to maintain natural state); and,

Eminent domain (dilatory or abandoned) – Thomas W. Garland, Inc. v. *City of St. Louis*, 596 F.2d 784 (8th Cir. 1979); *Richmond Elks Hall Association* v. *Richmond Redevelopment Agency*, 561 F.2d 1327 (9th Cir. 1977) (inverse condemnation); *Foster* v. *City of Detroit*, 405 F.2d 138 (6th Cir. 1968); *Madison Realty Co.* v. *City of Detroit*, 315 F. Supp. 367 (E.D. Mich. 1970); *Haczela* v. *City of Bridgeport*, 299 F. Supp. 709 (D. Conn. 1969); *Benenson* v. *United States*, 212 Ct. Cl. 375, 548 F.2d 939 (1977) (inverse condemnation); *Drakes Bay Land Co.* v. *United States*, 191 Ct. Cl. 389, 424 F.2d 574 (1970); *Hardesty* v. *State Roads Commission*, 276 Md. 25, 343 A.2d 884 (1975) (scenic easement); *Lincoln Loan Co.* v. *State Highway Commission*, 274 Or. 49, 545 P.2d 105 (1976); *Miller* v. *City of Beaver Falls*, 368 Pa. 189, 82 A.2d 34 (1951); *In re Cornell Industrial Electric, Inc.*, 19 Pa. Commw. 599, 338 A.2d 752 (1975).

The Supreme Court opinions in *Pumpelly, Pennsylvania Coal,* and *Penn Central* are major pronouncements of the unwavering constitutional principle that private property cannot be appropriated via exercise of the police power without payment of just compensation. The above litany of cases bears that principle out as well as the more fundamental point that the fifth and fourteenth amendments insure, at minimum, *the right to make a claim for a taking of property.*

> Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right. . . . In fact, a *fundamental interde-*

> *pendence* exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. *That rights in property are basic civil rights has long been recognized. Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 552 (1972) (emphasis added).

The severe and singular approach adopted in *Agins*, denying for the future any chance for a case-by-case taking analysis, flies in the face of both the Constitution and Supreme Court rulings thereunder. At its heart, the Constitution seeks that necessary balance between individual rights, personal and property, and public necessity. That is the essence of fairness, and, at bottom, the value of constitutional scrutiny.

III. The Decision of the Court Below Violates the Supremacy Clauses of the Federal and State Constitutions.

Under the supremacy clauses of the United States and California Constitutions,[11] the courts are bound by the terms of the fifth and fourteenth amendments. *See, e.g., Cooper* v. *Aaron*, 358 U.S. 1 (1958); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803); 1 T. Cooley, Constitutional Limitations 25 (8th ed. 1927). No ruling of a state court can negate the meaning of the federal Constitution's provisions as interpreted by this Court. 16 Am. Jur. 2d *Const. Law* §§50, 54 (1964, Supp. 1978). Yet, as the above arguments have shown, the court below has not only greatly misinterpreted the Constitution's just compensation clause

[11] "This Constitution . . . shall be the supreme law of the land; and the judges in every State shall be bound thereby . . . ." U.S. Const. art. 6. ". . . [T]he United States Constitution is the supreme law of the land." Cal. Const. art. 3, § 1.

but has also plainly ignored the many rulings of this Court regarding compensatory de facto takings and the necessity for case-by-case factual inquiries. Having based its decision upon the Constitution, the court below should be held to it.

CONCLUSION

For the above reasons, the Court should note probable jurisdiction.

Respectfully submitted,

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October 1979

Certificate of Service

I hereby certify on this twenty-second day of October, 1979, that three copies of this brief amici curiae were air mailed postage prepaid to counsel for appellants, John P. Pollock, Pollock, Williams & Berwanger, 800 West Sixth Street, Los Angeles, California 90017, and to counsel for appellee, Robert I. Conn, Town Attorney, 1534 Fifth Avenue, San Rafael, California 94901.

Gus Bauman

GUS BAUMAN
Counsel for Amici

Supreme Court, U.S.
FILED
FEB 21 1980
MICHAEL RODAK, JR., CLERK

JOINT APPENDIX.

IN THE

Supreme Court of the United States

October Term, 1979
No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,

Appellants,

vs.

CITY OF TIBURON,

Appellee.

On Appeal From the Supreme Court of California.

Filed October 11, 1979.

Probable Jurisdiction Noted January 7, 1980.

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IN THE

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On Appeal From the Supreme Court of California.

JOINT APPENDIX.

A. Relevant Docket Entries in the Proceeding Below.

Date	Identification
June 16, 1975	Complaint in Inverse Condemnation and for Declaratory Relief filed in the Superior Court of California, County of Marin. (The Complaint is contained in this Joint Appendix beginning at page 4).
October 31, 1975	Demurrer to Complaint. (The Demurrer is contained in this Joint Appendix beginning at page 26).
April 23, 1976	Order Sustaining Demurrer to First Cause of Action Without Leave to Amend and to Second Cause of Action With Leave to Amend. (This Order is contained in this Joint Appendix beginning at page 27).
May 5, 1976	Judgment of Dismissal. (This is contained in Appendix B to the Jurisdictional Statement).
June 2, 1976	Notice of Appeal. (This is contained in this Joint Appendix beginning at page 28).
March 14, 1979 (Modified May 17, 1979)	Opinion and Decision of the Supreme Court of California. (This is printed in Appendix A to the Jurisdictional Statement.)
July 6, 1979	Notice of Appeal to the Supreme Court of the United States filed with the Supreme Court of California. (This is printed in Appendix C to the Jurisdictional Statement.)

B. Relevant Pleadings, Charges, Findings and Opinions.

1. The Complaint filed June 16, 1975. (Printed in this Joint Appendix commencing at page 4).
2. Demurrer to Complaint filed October 31, 1975. (Printed in this Joint Appendix commencing at page 26).
3. Order Sustaining Demurrer filed April 23, 1976. Printed in this Joint Appendix commencing at page 27).
4. Notice of Appeal filed June 2, 1976. (Printed in this Joint Appendix commencing at page 28).
5. Opinion and Decision of the Supreme Court of California as modified by it on May 17, 1979. (Printed as Appendix A to the Jurisdictional Statement). This is the decision in question in this appeal.

Complaint in Inverse Condemnation and for Declaratory Relief.

Superior Court of California, County of Marin.

Donald W. Agins and Bonnie G. Agins, Plaintiffs, v. City of Tiburon, a municipal corporation, and Does One through Fifty, Defendants. No. 75873.

Filed: June 16, 1975.

Plaintiffs complain of Defendants, and each of them, and for cause of action allege:

FIRST CAUSE OF ACTION—
INVERSE CONDEMNATION

I

Defendant, CITY OF TIBURON, is a municipal corporation in the County of Marin, State of California, organized and existing under the laws of the State of California. It is a peninsula, surrounded by navigable water on three sides, containing an area of 1676 acres and having an approximate population of Six Thousand, Two Hundred, and Nine persons pursuant to a calculation based upon the 1970 census. Luxuriant foliage, aquatic facilities, favorable climate, proximity to San Francisco, and Ridgelands affording a sweeping view of the San Francisco Bay Area are among the many factors constituting this entire area the most desirable place to live in the State of California and resulting in the highest land value per acre for suburban areas in the State of California.

II

Defendants DOES ONE through FIFTY are individuals acting as agents, principals, or individuals who at certain times relevant hereto, by and with the knowledge and consent of Defendant Tiburon, have acted in

a negligent, fraudulent, oppressive, coercive, or otherwise illegal manner with the deliberate and calculated design of depriving Plaintiffs and others similarly situated of real property and the profits derived therefrom without due process of law and just compensation and to damage Plaintiffs and others similarly situated in their property rights the natural and proximate result of which courses of conduct has been to cause Plaintiffs and others similarly situated monetary damages as hereinafter alleged. The identities of said Defendants are not known and cannot be ascertained at the date hereof and for that reason said Defendants are designated herein as fictitious persons. In this regard, Plaintiffs pray for leave to allege said Defendants by their true names by appropriate amendment hereto at such time or times as said identities are ascertained and established.

III

At all times pertinent hereto, Plaintiffs were and now are the owners of five acres of land located in the County of Marin, State of California, and situated within the confines of Defendant, CITY OF TIBURON. The exact description of the aforesaid real property is set forth in Exhibit "A" attached hereto, incorporated herein, and by this reference made a part hereof. Said land was acquired by Plaintiffs for the purpose of effecting residential development thereon, is ideal for said function which constitutes its highest and best use; and Plaintiffs have been at all times ready, able, and willing to accomplish said development. All of said lands owned by Plaintiffs are ridgelands as hereinafter described, possess magnificent views of San Francisco Bay and the scenic surrounding areas, have the highest market values of all lands within the city limits of Defendant, CITY OF TIBURON, and by legislative

definition combined with topographical and geographical characteristics are indispensable to and an essential part of the open-space program which Defendant, CITY OF TIBURON, attempted to convert into legislation as hereinafter described.

IV

On or about June 28, 1973, Defendant, CITY OF TIBURON, enacted Ordinance 124. N.S. which forever prevented the development for residential use or otherwise of the entire area of said lands which have been characterized legislatively and otherwise as an indispensable component of the open-space program legislation adopted by said Defendant. The terms and provisions of said ordinance are by this reference incorporated herein and made a part hereof.

V

On or about January 15, 1972, Defendant, CITY OF TIBURON, directed Dean Witter & Company, Incorporated, to prepare a written plan for the City of Tiburon for open-space acquisition financing. Pursuant thereto, said plan was prepared, promulgated, delivered, accepted, and published on or about July 3, 1972. Said plan, which was approved by Defendant, CITY OF TIBURON, was filed with the official records of said municipality and the terms and provisions thereof are by this reference incorporated herein and made a part hereof. The aforesaid Ordinance 124 N.S. incorporated and adopted said plan in its entirety. Said plan described and identified the real property of Plaintiffs as aforesaid, rendered the acquisition thereof for cash obligatory, and directed a bond issue upon the part of Defendant, CITY OF TIBURON, for the sum of $1,250,000.00; a part of which was required for the purchase of Plaintiffs' property as aforesaid.

VI

Subsequent to the aforesaid date of rendition and acceptance of said Financing Plan, Defendant, CITY OF TIBURON, in accordance with all of the terms and provisions thereof, sold the bonds, received the aforesaid consideration in cash, used a part thereof to purchase a parcel of Ridgelands adjoining Plaintiffs' lands but has refused to expend the allocable part thereof calculated by said Dean Witter & Company, Incorporated, and Defendant, CITY OF TIBURON, notwithstanding the demand of Plaintiffs therefor as hereinafter alleged.

VII

On or about January 15, 1972, Defendant, CITY OF TIBURON, directed the City Planning firm of Williams & Mocine to prepare and deliver to said Defendant the Tiburon Open-Space Plan. Pursuant thereto and on or about October 1, 1972, said Plan was delivered to said Defendant, promulgated, advertised, accepted, and adopted. The aforesaid Plan unequivocally identified Plaintiffs' property by parcel, map, description, and name as indispensable to and necessary for the open-space program in question and dictated that the aforesaid property be forthwith purchased from Plaintiffs by Defendant, CITY OF TIBURON, for cash in accordance with the Financing Plan of Dean Witter as aforesaid and the basic purpose of said Plan of Williams & Mocine in order to conform to the stated and legal limits of the proposed Ordinance.

VIII

The aforesaid Ordinance of Defendant, CITY OF TIBURON, designated as 124 N.S. and enacted on June 28, 1973, incorporated by reference all of the terms and provisions of both the Planning and Financing Documents as aforesaid, was based thereon and limited in every respect to the terms thereof and completely restricted to the mandates therein expressed.

IX

The aforesaid Ordinance of Defendant, CITY OF TIBURON, 124 N.S., has completely destroyed the value of Plaintiffs' property for any purpose or use whatsoever; and the natural and proximate result of said Ordinance has been to prevent any sale, use, transfer, or development thereof or any part thereof. Said Ordinance has resulted in the taking of Plaintiffs' property by Defendant, CITY OF TIBURON, without due process of law and without any compensation therefor in violation of the Federal and State constitutional rights of Plaintiffs.

X

Plaintiffs, as the direct and proximate result of the conduct and activities of Defendants as aforesaid, including, but not limited to, the enactment of said Ordinance 124 N.S., have been damaged in the sum of Two Million ($2,000,000) Dollars consisting of the estimated fair market value of the lands taken as aforesaid and the deprivation and loss of use thereof to the date of the commencement of this proceeding.

XI

Plaintiffs have not been paid any sums whatsoever nor have they or any of them received any sums as and for damages for the activities described herein.

XII

On October 15, 1972, Plaintiffs duly filed a claim for said damages in the amount of Two Million ($2,000,000) Dollars with Defendant, CITY OF TIBURON, in accordance with law; and a true and

correct copy of said claim is attached hereto, marked Exhibit "B" and by this reference incorporated herein and made a part hereof.

XIII

On November 12, 1973, said claim was rejected by Defendant, CITY OF TIBURON, and a true and correct copy of notice of rejection of said claim is attached hereto marked Exhibit "C" and by this reference incorporated herein and made a part hereof.

XIV

On or about October 25, 1973, Defendant, CITY OF TIBURON, duly passed a resolution directing the forthwith acquisition by condemnation procedures of approximately 25 acres of land adjoining the land of Plaintiffs herein identical in topographical characteristics and designated as open-space area acquired by said Defendant Tiburon for its open-space program; and said property was then and there publicly earmarked for purchase by Defendant Tiburon and the funds to be used therefor were to be taken from the proceeds of the aforesaid bond issue.

XV

Subsequent thereto, without any notice or cause whatsoever, Defendant, CITY OF TIBURON, rescinded its resolution to acquire the aforesaid 25 acres by condemnation procedure as aforesaid.

XVI

On October 26, 1973, Defendant, CITY OF TIBURON, duly passed a resolution directing the forthwith acquisition by condemnation procedure of the real property of Plaintiffs described herein.

XVII

On December 4, 1973, Defendant Tiburon filed a complaint in Eminent Domain against Plaintiffs herein wherein it sought to acquire the real property of Plaintiffs described herein; and, on said day, summons was issued and thereafter duly served.

XVIII

The Answer and Cross-Complaint of Plaintiffs herein and Defendants in the aforesaid action—DONALD and BONNIE AGINS—was filed on January 7, 1974, and thereafter said Eminent Domain proceeding, being NO. 69070, was placed at issue.

XIX

On October 3, 1974, Defendant, CITY OF TIBURON, filed and served a Notice of Motion to advance the trial date and incident thereto obtained an ex parte order shortening time for the hearing thereof to five days.

XX

On October 15, 1974, the above-entitled court granted the motion of Defendant Tiburon to advance the trial date and at that time set the settlement conference date for November 4, 1974, and the date of trial by jury for November 18, 1974.

XXI

On October 31, 1974, Plaintiffs herein filed and served a Notice of Appeal from a portion of the order of court rendered in the aforesaid Eminent Domain proceeding on September 3, 1974.

XXII

On November 1, 1974, being one day after the commencement of the aforesaid appeal, Defendant

Tiburon filed its Notice of Abandonment of the aforesaid Eminent Domain proceeding.

XXIII

On November 18, 1974, the above-entitled court rendered its order taking the aforesaid Eminent Domain proceeding off the trial calendar.

XXIV

On February 5, 1975, Defendant Tiburon filed and served a notice of its motion for an order of dismissal of the aforesaid Eminent Domain proceeding.

XXV

On May 20, 1975, the above-entitled court rendered its Judgment of Dismissal of the aforesaid Eminent Domain proceeding.

XXVI

A total period of time comprising one year, six months, and twenty-five days was thereby intentionally devoted by Defendant Tiburon to the total destruction of the use and marketability of the real property of Plaintiffs herein and the public promulgation of its notice to and efforts for the acquisition of not only Plaintiffs' property herein but the aforesaid parcels of real property adjoining the property owned by Plaintiffs as aforesaid.

XXVII

At all times pertinent hereto and for a considerable period of time prior to the events herein alleged, Defendant Tiburon caused to be published and permitted the publication thereof of all proceedings concerning the acquisition of the real property in question, the purpose thereof and the nature of the measures instituted by said Defendant for the accomplishment of its avowed purposes.

XXVIII

As a direct and proximate result of the conduct of Defendants as aforesaid, Plaintiffs have been deprived of property without due process of law or the payment of any compensation therefor to their damage in the sum of Two Million ($2,000,000.00)

XXIX

As a direct and proximate result of the conduct of Defendant, CITY OF TIBURON, Plaintiffs have suffered damages in the amount of Two Million ($2,000,000.00) Dollars.

SECOND CAUSE OF ACTION—
DECLARATORY RELIEF

I

Plaintiffs incorporate by reference herein all of the allocations of the aforesaid First Cause of Action for Inverse Condemnation.

II

As the direct and proximate result of the enactment of Ordinance 124 N.S. by Defendant, CITY OF TIBURON, all of the facts and circumstances hereinabove alleged and the relationship between Plaintiffs and Defendant, CITY OF TIBURON, all of which factors seriously affect the value and use of the real property owned by Plaintiffs as aforesaid an actual controversy exists between Plaintiffs and Defendant, CITY OF TIBURON, concerning past, present, and future legal rights and duties of the respective parties.

More particularly, said controversy raises the following opposing contentions:

(a) Plaintiffs contend:

(1) The Ordinance in question considered separately or in conjunction with the Financing

and Planning Reports and the subsequent acts of Defendant, CITY OF TIBURON, in condemning and purchasing the aforesaid parcels of land adjoining the lands of Plaintiffs is unconstitutional, illegal, and void in that it has unreasonably restricted and does unreasonably restrict Plaintiffs' use and enjoyment of their property.

(2) That said Ordinance is unconstitutional, illegal and void on its face, in that it unreasonably restricts the use and enjoyment of private property and is not reasonably related to its stated legislative purpose of preserving and conserving open space because it purportedly allows development of land for dwellings and thus is an abuse of legislative discretion.

(3) That said Ordinance is null and void because it is not a valid local open-space plan for the City of Tiburon.

(4) That said Ordinance is unconstitutional, illegal and void in that it has no reasonable relation to public health, safety, morals, or general welfare.

(5) That the Ordinance is unconstitutional, illegal, and void as to Plaintiffs in that it deprives them of property without just compensation.

(6) That the Ordinance is an arbitrary, unreasonable, and unnecessary means of preserving open space and that such regulations are a taking of property for public use and benefit and are valid only on the condition that

Defendant Tiburon compensate Plaintiffs for property taken.

(7) That the Ordinance in question is arbitrary, capricious, and unreasonable and therefore constitutes a taking of their property without payment of just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and the California Constitutional provisions protecting the owners of property against such conduct.

(8) The publication of the Financing and Planning Reports and all other publicized legislative activities relating to the proposed open-space plan which preceded the actual enactment of Ordinance 124 N.S. constituted an actual taking of property without due process of law and without the payment of compensation therefor in that said activities and conduct upon the part of Defendant Tiburon were intended to and did in fact prevent development of the land in question, thus reducing its market value in the event of condemnation.

(9) That the sale of the bonds as aforesaid pursuant to the indicated advertisements, solicitations, and legislative enactments necessitated the purchase of Plaintiffs' property described herein with the proceeds thereof within a reasonable period of time from the date of receipt of the proceeds of sale.

(10) That the aforesaid bond issue, all reports, and publications in regard thereto and the receipt of said purchase prices constitutes a

taking of Plaintiffs' property as of the date of the first publication of said activities.

(b) Defendant, CITY OF TIBURON, contends:

(1) That the aforesaid Ordinance and all of the related activities are valid exercises of the police power and compensation is not required.

(2) That the Ordinance and related activities are consistent with existing Open-Space Legislation enacted by the State of California.

(3) That notwithstanding the taking of Plaintiffs' property as aforesaid and the requirement of compensation therefor, the time of payment is a matter solely within the discretion of said Defendant and in the interim the funds so hypothecated for the purchase of Plaintiffs' property can be invested by said Defendant for its sole benefit at an interest rate that is more than double the interest that must be paid to the bondholders.

WHEREFORE, Plaintiffs pray for judgment as follows:

1. Judicial determination that the real property described herein or a substantial part thereof was taken by Defendant, CITY OF TIBURON, without due process of law or the payment of just compensation therefor and the further determination of the exact date of said taking.
2. The payment to Plaintiffs by Defendant, CITY OF TIBURON, of the sum of Two Million ($2,000,000.00) Dollars representing the calculation dated December 31, 1973,

of the fair market value of said real property as of the date of the estimated time of taking together with interest thereon as appropriate.

3. The payment to Plaintiffs by Defendants of the sum of Four Hundred Thousand ($400,-000.00) Dollars per year for loss of use or interference with the said real property from the date of the determined taking until the date of payment of damages in accordance with any judgment rendered herein.
4. The declaration of the rights and duties of the parties hereto in accordance with the allegations set forth in the Cause of Action for Declaratory Relief.
5. That the court declare Ordinance 124 N.S. illegal, unconstitutional, and void.
6. That the court declare Ordinance 124 N.S. illegal, unconstitutional, and void as applied to Plaintiffs' property described herein.
7. Costs of suit incurred herein.
8. Reasonable attorney, appraisal, engineering, and other related fees.
9. Such other and further relief as to the court may appear proper.

DATED: June 4, 1975

/s/ Reginald G. Hearn
REGINALD G. HEARN,
Attorney for Plaintiffs

VERIFICATION

I, REGINALD G. HEARN, state as follows:

I am an attorney at law duly admitted to practice law in the State of California, and I am counsel of record for the Plaintiffs herein.

I make this statement on behalf of the Plaintiffs because said parties are absent from the City and County of San Francisco wherein my office is located.

I have read the within COMPLAINT IN INVERSE CONDEMNATION AND FOR DECLARATORY RELIEF, and I am informed and believe the matters therein stated are true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on June 4, 1975, at San Francisco, California.

/s/ Reginald G. Hearn
REGINALD G. HEARN
Attorney for Plaintiffs

Exhibit "A".

DESCRIPTION:

That certain real property situated in the County of Marin, City of Tiburon, State of California, described as follows:

PARCEL ONE:

BEGINNING at the Northeast corner of that certain parcel of land conveyed from C. O. Sollom, administrator, to Warren L. Bostick, et al, by deed recorded January 24, 1949 in Book 607 of Official Records, at page 152, Marin County Records; and running thence along the Northeasterly line of said property, North 45° 24′ West (old ranch North 45° 51′ West) 367.25 feet; thence leaving said line and running South 44° 36′ West 518.213 feet; thence South 55° 59′ East 17.238 feet; thence on a curve to the right whose center bears South 34° 01′ West and whose radius is 625.0 feet, distant 115.446 feet; thence South 45° 24′ East 343.560 feet to the Southeasterly line of said Bostick property; running thence along said line North 34° 42′ East (old ranch North 34° 15′ East) 512.110 feet to the point of beginning.

PARCEL TWO:

AN EASEMENT for roadway and utility purposes over a 60.0 foot strip of land, the center line of which is described as follows:

BEGINNING at a point on the Southeasterly line of a County road, distant South 73° 07′ West 256.84 feet; thence on a curve to the left whose center bears South 16° 53′ East and whose radius is 970.0 feet, distant 178.970 feet from the most Northerly corner of that certain tract of land conveyed from C. O. Sollom, administrator, to Warren L. Bostick, et al,

by deed recorded January 24, 1949 in book 607 of Official Records at page 152, Marin County Records; and running thence South 49° 18′ 40″ East 230.842 feet; thence on a curve to the right whose center bears South 40° 41′ 20″ West and whose radius is 150.0 feet, distant 134.943 feet; thence South 2° 14′ West 103.987 feet; thence on a curve to the right whose center bears North 87° 46′ West and whose radius is 100.0 feet, distant 79.180 feet; thence South 47° 36′ West 52.287 feet; thence on a curve to the left whose center bears South 42° 24′ East and whose radius is 70.0 feet, distant 121.369 feet; thence South 51° 44′ 30″ East 133.779 feet; thence on a curve to the right whose center bears South 38° 15′ 30″ West and whose radius is 200.0 feet, distant 77.987 feet; thence South 29° 24′ East 49.612 feet; thence on a curve to the left whose center bears North 60° 36′ East, radius 200.0 feet, distant 56.781 feet; thence South 45° 40′ East 86.308 feet; thence on a curve to the right whose center bears South 44° 20′ West and whose radius is 100.0 feet, distant 59.608 feet; thence South 11° 30′ 50″ East 154.03 feet; thence on a curve to the left whose center bears North 78° 29′ 10″ East and whose radius is 150.0 feet, distant 199.324 feet; thence South 87° 39′ East 233.566 feet; thence on a curve to the right whose center bears South 02° 21′ West and whose radius is 300 feet, distant 49.829 feet; thence South 78° 08′ East 25.932 feet to a station designated Station A; thence South 78° 08′ East 44.278 feet; thence on a curve to the

right whose center bears South 11° 52′ West and whose radius is 73.582 feet, distant 83.818 feet, to a point in the center line of a 50.0 foot easement; thence running along said line South 12° 52′ East 103.845 feet; thence on a curve to the right whose center bears South 77° 08′ West and whose radius is 350.0 feet, distant 94.379 feet; thence South 02° 35′ West 85.627 feet; thence on a curve to the left whose center bears South 87° 25′ East and whose radius is 190.0 feet, distant 127.394 feet; thence South 35° 50′ East 172.404 feet; thence on a curve to the right whose center bears South 54° 10′ West and whose radius is 6497.230 feet, distant 321.295 feet; thence on a curve to the left whose center bears North 57° 00′ East and whose radius is 605.027 feet, distant 130.940 feet to a point which bears South 44° 36′ West 20.0 feet from the Southwest corner of that certain parcel of land conveyed by C.O. Sollom, administrator, to Arne Ely Ingels, by deed recorded February 21, 1947 in Book 542 of Official Records at page 389, Marin County Records; thence running along a 45.0 foot roadway and utility easement lying 20.0 feet on the Northeasterly side and 25.0 feet on the Southwesterly side of a line 20.0 feet Southwesterly from and parallel to, the Southwesterly line of said Ingels property, South 45° 24′ East 1525.0 feet to a point South 44° 36′ West 20.0 feet from the Southeast corner of said Ingels property; thence continuing along the center line of a 50.0 foot easement, South 61° 49′ East 880.598 feet; thence on a curve to the right

whose center bears South 28° 11′ West and whose radius is 1150.0 feet, distant 117.083 feet; thence South 55° 59′ East 334.118 feet to the intersection with the center line of a 40.0 foot road right of way, said point of intersection known as station B; thence continuing along the center line of said 50.0 foot easement, South 55° 59′ East 540.508 feet; thence on a curve to the right whose center bears South 34° 01′ West and whose radius is 600.0 feet, distant 110.828 feet; thence South 45° 24′ East 250.0 feet.

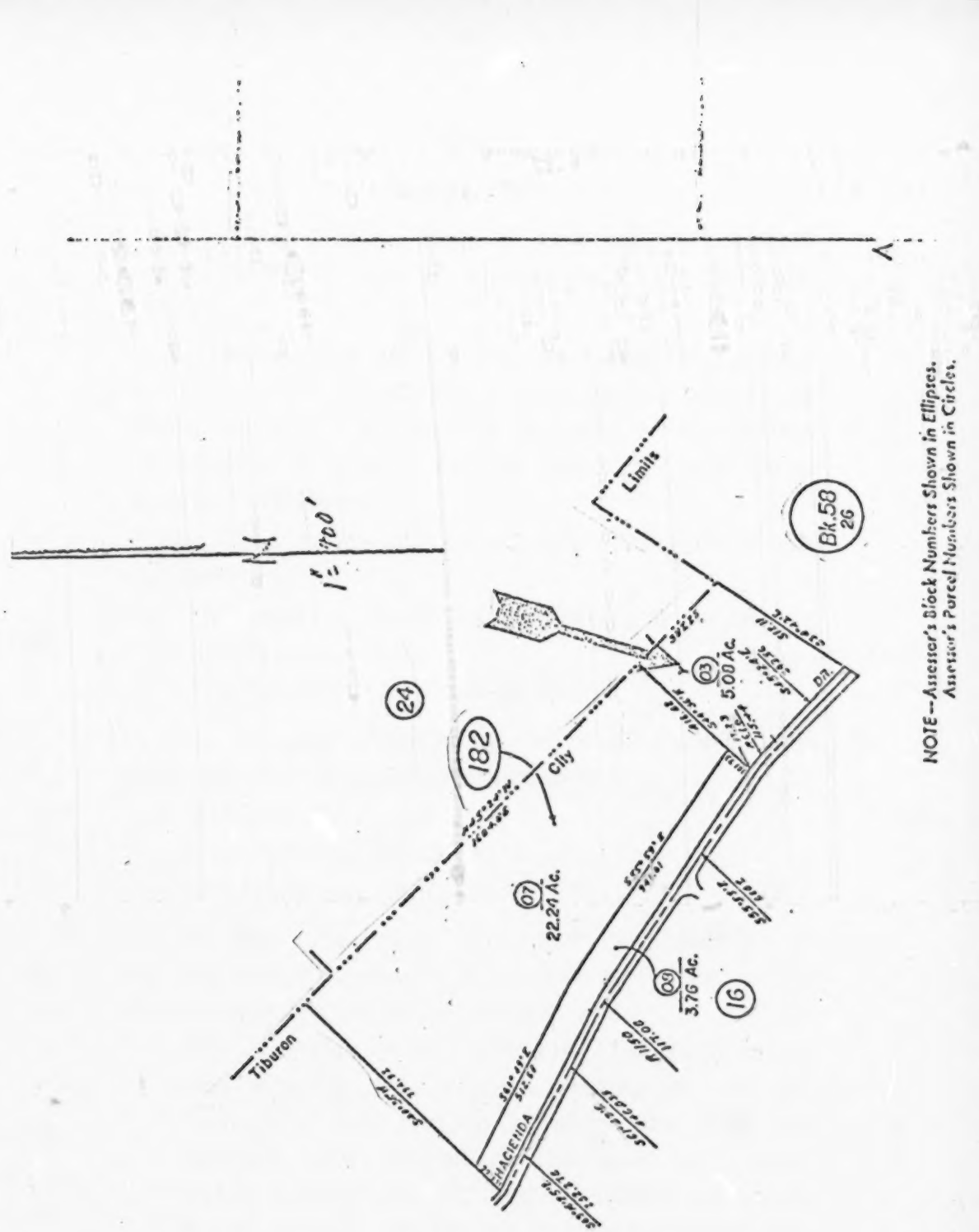

Exhibit "B".

In the Matter of the Claim of DONALD W. AGINS and BONNIE G. AGINS, against the CITY OF TIBURON.

The undersigned claimants hereby make claim against the CITY OF TIBURON, located in the county of Marin, state of California in the sum of two-million (2,000,000.00) dollars and in support of said claim represent as follows:

(a) The names and post office addresses of the claimants are:

DONALD W. AGINS and BONNIE G. AGINS
221 Oakcrest Road
San Anselmo, California 94960

(b) The post office address to which the claimants presenting this claim desire notice to be sent is:

REGINALD G. HEARN
100 California Street
San Francisco, California 94111

(c) The date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted herein are as follows:

The ordinance of the CITY OF TIBURON passed and adopted at a regular meeting of the city council of said city on or about the 28th day of June, 1973, and alleged on belief to be ordinance number 123-NS, and all related legislative action by said council whereby either directly or indirectly the real property described herein and at all times pertinent hereto owned, possessed and controlled by claimants, was classified as "Open Space Territory" and thereby burdened, slan-

dered, rendered unmarketable, caused to be incapable of utilization by the owners thereof and totally deprived of its inherent economic function to claimants as an investment or otherwise.

(d) A general description of the indebtedness, obligation, injury, damage or loss incurred so far as it may be known at the time of presentation of this claim is as follows:

The legislative inactment as aforesaid, related legislative inactments and activities occasioned and effected by said city and all statements, either verbal or written made and caused to be published on behalf of said city wherein the words "Open Space Land" have been uttered or written in relation to the property owned by claimants herein or adjoining, adjacent or neighboring property have completely destroyed the purpose for which the property was purchased by claimants, prevented any sale thereof and deprived and taken without due process of law and just compensation, for the benefit of the CITY OF TIBURON and the public generally all of the property as aforesaid.

(e) The name or names of the public employee or employees causing the injury, damage or loss are the members of the city council of the CITY OF TIBURON and in addition thereto all other employees of said city who in any way and while acting within the scope of their employment performed any duties relating to the "Open Space Program", the acquisition of land by the aforesaid city, the zoning or rezoning thereof, the planning function as it relates to land within the confines of the CITY OF TIBURON or otherwise.

(f) The amount claimed as of the date of presentation of this claim including the estimated amount of any prospective injury, damage or loss, insofar as it may be known at the time of the presentation of this claim is two million (2,000,000.00) dollars.

The basis for computation of the amount claimed is the calculated fair market value of the date hereof of the real property described herein.

(g) The real property to which reference is made herein is described in exhibit (A) attached hereto, incorporated herein, and by this reference made a part hereof. The deed to said property is recorded in book 2250 at page 302 of the official records of Marin County, California which recording data is also incorporated herein.

DATED: September 20, 1973.

DONALD W. AGINS
BONNIE G. AGINS

Exhibit "C".

(LETTERHEAD)
November 15, 1973

Donald W. and Bonnie G. Agins
c/o Reginald Hearn, Esq.
100 California Street
San Francisco, California 94111

Re: Agins v. City of Tiburon

Dear Mr. and Mrs. Agins:

Notice is hereby given that the claim which you presented to the City of Tiburon on October 16, 1973, was refused on November 12, 1973.

WARNING

Subject to certain exceptions, you have only six (6) months from the date this notice was personally delivered or deposited in the mail, to file a court action on this claim. See Government Code Section 945.6.

You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately.

Very truly yours,
/s/ Richard H. Breiner
RICHARD H. BREINER
Deputy City Attorney

RHB:mq
cc: Mr. R. L. Kleinert, City Manager

Demurrer to Complaint.

Superior Court of the State of California for the County of Marin.

Donald W. Agins and Bonnie G. Agins, Plaintiffs, vs. City of Tiburon, a municipal corporation, and Does One through Fifty, Defendants. No. 75873.

Filed: Oct. 31, 1975.

Defendant, CITY OF TIBURON, a municipal corporation, demurs to the complaint, and each cause of action thereof, on each and all of the following grounds:

I.

The allegations in the purported first cause of action of the complaint do not state facts sufficient to constitute a cause of action. (C.C.P. Section 430.10(f)).

II.

The allegations in the purported second cause of action of the complaint do not state facts sufficient to constitute a cause of action. (C.C.P. Section 430.10 (f)).

III.

The Court has no jurisdiction of the subject of the causes of action alleged in the complaint.

IV.

The complaint is uncertain.

WHEREFORE, defendant, CITY OF TIBURON, prays that this demurrer be sustained without leave to amend, that plaintiffs take nothing by their action, and that defendant City have judgment for costs of suit and other proper relief.

DATED: October 28, 1975.

ROBERT I. CONN, City Attorney
RICHARD H. BREINER,
Deputy City Attorney
By /s/ Robert I. Conn
ROBERT I. CONN
Attorneys for City of Tiburon

Order Sustaining Demurrer.

Superior Court of the State of California, for the County of Marin.

Donald W. Agins and Bonnie G. Agins, Plaintiffs, vs. City of Tiburon, a municipal corporation, and Does One through Fifty, Defendants. No. 75873.

Filed: Apr. 23, 1976.

The demurrer of Defendant, CITY OF TIBURON, to the complaint in the above-entitled action came on regularly to be heard on March 29, 1976. RICHARD H. BREINER, Esq., appeared as counsel for said defendant and REGINALD G. HEARN, Esq., appeared as counsel for plaintiffs. The matter was argued and submitted to the Court for decision. The Court having given due consideration to said matters, and good cause appearing therefor:

IT IS ORDERED that the demurrer to the first cause of action of plaintiffs' complaint (inverse condemnation) be and is sustained without leave to amend on the ground that the allegations therein contained do not state facts sufficient to constitute a cause of action.

IT IS FURTHER ORDERED that the demurrer to the second cause of action of plaintiffs' complaint (declaratory relief) be and is hereby sustained on the ground that the allegations therein contained do not state facts sufficient to constitute a cause of action and plaintiffs are hereby granted ten (10) days, after notice, in which to amend.

DATED: April 23, 1976.

/s/ Jack L. Blaine
JACK L. BLAINE
JUDGE OF THE SUPERIOR COURT
PRO TEM

Notice of Appeal.

Superior Court of California, County of Marin.

Donald W. Agins and Bonnie G. Agins, Plaintiffs, v. City of Tiburon, a municipal corporation, and Does One through Fifty, Defendants. No. 75873.

Filed: June 2, 1976.

Plaintiffs hereby appeal from that certain Judgment of Dismissal rendered on May 5th, 1976 and entered on May 6th, 1976.

DATED: June 1st, 1976.

/s/ Reginald G. Hearn
Attorney for Plaintiffs
and Appellants.

C. Other Relevant Parts of the Record to Which the Parties Wish to Direct the Court's Particular Attention.

1. City of Tiburon Ordinance NO. 123 N.S. adopted June 28, 1973. (Printed in Appendix D to the Jurisdictional Statement.)

2. City of Tiburon Ordinance NO. 124 N.S. adopted June 28, 1973. (Printed in Appendix E to the Jurisdictional Statement.)

3. Sections 6950, 6951, 6952, 6953, 6954, 65560, 65561, 65562, 65563, 65566, 65567, 65910, 65911, 65912 of the Government Code of California (Printed in Appendix F. to the Jurisdictional Statement).

Supreme Court, U. S.
FILED
DEC 5 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,
Appellants,

vs.

CITY OF TIBURON,
Appellee.

Appeal From the Supreme Court of California.

MOTION TO DISMISS OR AFFIRM

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,
Appellants,

vs.

CITY OF TIBURON,
Appellee.

Appeal From the Supreme Court of California.

MOTION TO DISMISS OR AFFIRM

Appellee, City of Tiburon,[1] respectfully moves to dismiss the appeal on the ground that it does not present a substantial federal question, or alternatively to affirm the judgment of the California Supreme Court on the ground that the questions on which the decision of the cause depends are so unsubstantial as to not need further argument. Rule 16(1)(b) and (c).

---

[1]Tiburon has recently changed its name from "City of Tiburon" to "Town of Tiburon". For convenience the word "City" is used herein.

QUESTIONS PRESENTED

1. Has a state court reached a proper conclusion when it upholds the constitutionality of a zoning ordinance as enacted when the landowner has not sought approval from the local agency and when the zoning ordinance does not foreclose reasonable use of the land?

2. Has a state court reached a proper conclusion where it states that a landowner may seek judicial invalidation of an unconstitutional zoning ordinance but may not seek compensation under a theory of inverse condemnation?

3. Has a state court reached a proper conclusion when it finds under the facts as alleged, and as supplemented by facts subject to judicial notice, that a cause of action for inequitable precondemnation activities sufficient to constitute inverse condemnation has not been alleged?

STATEMENT OF FACTS

In 1973 the City of Tiburon adopted widespread and comprehensive zoning modifications (Ordinances 123NS and 124NS) which had the effect of placing large areas of the City (a small portion of which included appellants' five acres of undeveloped land) in the RPD-1 zone.[2] As so

[2]The brief filed by amicus on behalf of the National Association of Home Builders states (page 17) that *Agins* involves "rezoning of the property to a lower density;" and, appellants state that Ordinance 123NS "created restrictive zoning . . ." Juris. St. p. 8. The complaint nowhere alleges, however, what the prior zoning was; nor does it allege that the property was down-zoned; nor does it allege, or set forth facts which indicate how, or in what manner, the modified zoning regulations are more restrictive than those that previously existed (if, indeed, such is their contention).

As is apparent from the ordinance, one of the primary functions of the RPD-1 zone is to permit flexibility and deviation from traditional subdivision by permitting developers, through the vehicle of a master plan, to cluster the homesites. Clustering serves two very worthwhile purposes, to wit, (1) it allows the developer to build more economically (particularly on hillsides) by concentrating density in areas suited for development and at the same time (2) reduces cutting and grading and leaves more of the land in its open natural state. Where slope stability is poor [as Ordinance 124NS points out, "Much of the area is excessively steep and slope stability ranges from good to poor". Juris. St. App. p. 43], the value of the land is generally increased where clustering is permitted.

zoned, appellants were entitled to use their property for residential purposes as a matter of right. This, they concede in their complaint, is the highest and best use of the land and, in fact, the very purpose for which they acquired it. Notwithstanding the above, appellants have never, at any time, for any reason, made application of any kind to use, or improve, their property, for any purpose whatsoever.[3]

[3]"A party aggrieved by the application of a statute or ordinance must invoke and exhaust the administrative remedies provided thereby before he may resort to the courts for relief." *Metcalf v. Co. of Los Angeles* (1944), 24 Cal.2d 267, 269. "Administrative remedies must be exhausted even when the constitutionality of the basic legislation is challenged." *Aircraft & Diesel Equipt. v. Hirsch* (1947), 331 U.S. 752. *Pan Pacific Properties, Inc. v. Co. of Santa Cruz* (1978), 81 Cal.App.3d 244. The reason for the rule could not be better illustrated than by appellants' offer, contained in their brief filed with the California Supreme Court, to settle in exchange for an assurance of five homesites (a result that is, at least potentially, available on the administrative level).

Appellants complain that the California Supreme Court "ignored the allegations that, *as applied*, the Ordinance was confiscatory, and looked instead to the face of the Ordinance." Juris. St. p. 9. And, they argue, the high state court should have conducted a "factual inquiry" before ruling on Constitutionality. Juris. St. p. 4, ¶ 3. These contentions overlook the fact that a decision, and factual inquiry, as to whether the ordinance is constitutional *as applied* must first await action on an application for development. For, until they seek and have been denied there is no "actual controversy". *State of California v. Superior Court [Veta]* (1974) 12 Cal.3d 237. The issue before the California court was whether the Ordinance was constitutional on its face; there can be no question but that it is. "Unless the complaining party *pleads facts* to show that the ordinance is unreasonable as a *matter of law*, a Court will not presume the invalidity of a zoning ordinance . . . or consider the substitution of its judgment on zoning for that of the public authority." *Morse v. Co. of San Luis Obispo* (1967) 247 Cal.App.2d 600, 603 (emphasis added). And, see extended discussion text, *infra*.

Instead, and in lieu, of submitting an application and plans for residential development, appellants filed suit against the City wherein they alleged that the mere enactment of Ordinance 124NS "forever prevented the development [of the land] for residential use or otherwise"; "completely destroyed [its value] for any purpose or use whatsoever"; and "prevent[ed] any sale, use, transfer or development thereof . . .".[4]

In their first cause of action appellants claimed damages of 2 million dollars for inverse condemnation and in a second cause of action they sought a declaration that the ordinance was unconstitutional. The California Supreme Court affirmed the trial court's dismissal of both causes of action.[5]

---

[4]Other than these broad conclusionary assertions, there are no facts set forth in the complaint which explain how, or why, the ordinance destroyed the value of appellants' property. "Although appellants allege that the zoning ordinance constitutes 'acquisition for public use' they present no allegations of fact indicating either acquisition or public use. They have failed to set out facts in their complaint to show that the ordinance was a property-taking device rather than a regulation of the use of land" *Pinheiro v. Co. of Marin* (1976) 60 Cal.App.3d 323, 328. The ordinances enacted by the City, and here under consideration, contemplate no public use of appellants' property whatsoever.

[5]Tiburon is one of the smaller cities in California (Juris. St. p. 5) and, as such, its staff is neither large enough nor does it have the technical expertise to carry out the numerous and complex state mandated planning programs. If compliance is to be had, cities such as Tiburon have no alternative but to retain outside expert consultants to advise and consult with them. Juris. St. App. p. 2. As these consultants are independent contractors the employing public agency has no advance knowledge of, or authority to censor or control, such of their opinions, conclusions and recommendations as may be set forth in their reports filed with the City. The Dean Witter (Witter) and Williams & Mocine (Williams) reports referred to at page 7 of the Jurisdictional Statement are simply two (of many) such private advisory reports filed with the City.

In an apparent attempt to plead around a general demurrer, appellants alleged in their complaint that Ordinance 124NS ". . . in-

ARGUMENT

The Issues Actually Resolved By the Lower Court Are Much More Limited Than Portrayed By Appellants and Do Not Present Significant Questions Worthy of This Court's Attention

This case can be summarized as follows: the appellants are entitled as a matter of *right*, under a newly enacted zoning ordinance of the City of Tiburon, to use their five acres of land for one residential home; on application by the appellants, up to four additional homes may be approved by the city for a possible total of five homes on the five acres. (See Juris. St. App., p. 3) However, appellants have not applied to the city for any permit whatsoever and yet have alleged that their property has been

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corporated by reference all of the terms and provisions of both [the Witter and Williams reports] . . . was based thereon and limited in every respect to the terms thereof and completely restricted to the mandates therein expressed." As their theory of inverse was, clearly, bottomed upon the allegation that, ". . . the natural and proximate result of said Ordinance was [because of the allegation that it incorporated the Witter and Williams reports] to prevent any sale, use, transfer or development [of their property] or any part thereof" and, in view of the fact that these allegations were untrue, the trial court was requested to take judicial notice of Ordinance 124NS (allegations contrary to facts of which a court may take judicial notice are not deemed admitted for purposes of ruling on a demurrer. *Holmes v. City of Oakland* (1968) 260 Cal.App.2d 378, 382). Ordinance 124NS does not incorporate the Witter and Williams reports, by reference or otherwise; nor does it mention them in any manner whatsoever, directly or indirectly (Juris St. App. pp. 41-46).

As noted by the California Supreme Court (Juris St. App. p. 2) the "Financing Plan" and the "Open Space Plan" referred to at page 7 of the Jurisdictional Statement are, simply, "advisory reports;" and they were not adopted by the City by Ordinance 124NS, or otherwise. As further noted by the Court, the Resolution approving the sale of the bonds (Juris. St. p. 7) did not specifically authorize acquisition of appellant's property or directly refer to it (Juris St. App. p. 3). [If, as appellants claim, their property is worth two million dollars, it is apparent that if the City had attempted to purchase not only would the bond money of $1.5 million have been exhausted, but the City would have been left $500,000 in debt].

rendered useless by action of the city. To avoid the rather obvious conclusion that their property can be put to a reasonable use, appellants point to the activities of the city leading to the filing of an action in eminent domain. But that litigation was abandoned by the city according to statutory procedures culminating in a court order which has long since become final.

In this setting appellants present this case as if it raised a broad variety of issues. In fact, however, many of the issues raised by the jurisdictional statement are not raised by the pleadings and were not argued by the appellants below.[6] It therefore seems appropriate to point out precisely what the California Supreme Court did hold, as well as to point out what issues are not involved in this case. These latter issues are not properly before this Court. *Cardinale v. Louisiana* (1968) 394 U.S. 437.

Initially, the high State Court recited the general principle that a zoning ordinance may be unconstitutional and therefore invalid when its effect is to deprive the owner of substantially all reasonable use of the subject property. Applying this general principle the Court held that the ordinance involved did not have that effect since it allows appellants to construct from one to five residences on their property. (Juris. St. App., p. 13). Furthermore, the Court held that the proper remedy for challenging an unconstitutional regulation is an action in the nature of mandamus

[6]Some of the broad array of issues appellants now seek to raise were first presented in appellants' petition for rehearing before the California Supreme Court and in the briefs of some of their supporting amici. Thus, it was not until after the opinion of the California Supreme Court that appellants saw fit to expand their perception of this case.

or declaratory relief and not inverse condemnation. (See generally, Juris. St. App., pp. 5-12). Finally, the Court held that the so-called "pre-condemnation activities" of the city did not give rise to an action for damages. (See generally, Juris. St. App., pp. 13-15).

This case does not present the following issues:

(1) Failure of the City of Tiburon to provide for low and moderate income housing by any means including exclusionary zoning.[7]

Such issues were not raised below, either in the pleadings or in the arguments presented. In any event, the California Supreme Court has addressed itself to the legal principles applicable to local actions which may have unfavorable regional impacts. *Associated Homebuilders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582.

(2) The case does not involve a situation where a plethora of permits are required from numerous local agencies, special districts, regional agencies, state agencies and federal agencies. See Juris. St., pp. 13-15).[8] The pleadings in this case speak only to actions of the City of

[7]The Court's attention is invited to *Winkelman v. City of Tiburon* (1973) 32 Cal.App.3d 834, which appellants observe to involve "ingenious tokenism". (Juris. St. p. 17, fn. 13). No "ingenious tokenism" is evident in that case, whatever that term may mean. It is respectfully requested that the gratuitous observations about Marin County in that footnote be disregarded as irrelevant. In fact in *Winkelman* it is revealed that a public housing project existed on the subject property and that the city's efforts to provide new dwelling units for people of low and moderate income were proposed and upheld by the Court.

[8]In this regard the examples cited in the Jurisdictional Statement at p. 13, fn. 8 are irrelevant. Further, one of them, the reference to the Walt Disney Project, deals with a proposal which would have been located entirely on federal lands. See *Sierra Club v. Morton* (1971) 405 U.S. 727.

Tiburon, nothing more. Nowhere below was it suggested that under the facts as alleged there are any federal constitutional issues raised by requirements that appellants obtain multiple permits from several layers of public agencies.

(3) This case does not involve abuse by government agencies in continually adjusting their positions following adverse court decisions against them with the intent of continuing to frustrate an owner in accomplishing any reasonable use of land. (See Juris. St., pp. 28-29). The appellants have never applied to the city and thus the city has never even had the opportunity to indicate what number of homes it might approve on appellants' parcel.

(4) The case does not present a claim under 42 U.S.C. section 1983. (See Juris. St., pp. 25-27). Such a cause of action was neither pled nor argued in the lower courts.

The California Supreme Court's Conclusion That Appellants' Land May Be Put To a Reasonable Use Under the City's Zoning Ordinance Is An Application of Established Constitutional Doctrine and Is Not Novel In Any Respect

In *Penn Central Transportation Co. v. City of New York* (1978) 438 U.S. 104, this Court concluded that New York City's denial of Penn Central's request to build a multistory office tower above Grand Central Terminal did not result in a "taking" of the railroad's property. In so holding this Court observed that Penn Central was capable of earning a reasonable rate of return on its investment and that the potential use of the air rights above the terminal, either through approval of a smaller office building or by

transfer of development rights to another parcel, mitigated the financial burdens of the city's historic landmark regulations. On these facts the Court concluded that:

> "The restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but afford appellants opportunities further to enhance not only the Terminal site proper but also other properties." *Id.*, p. 138.

The holding of the California Supreme Court that appellants have available to them a reasonable use of their property (thereby overcoming any claim of unconstitutionality or "taking") precisely follows the principles utilized by this Court's decision in *Penn Central*. See also, *Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365.

Penn Central is further instructive in response to appellants' claim that the California Court mistakenly refused to allow appellants to show that as the ordinance applies to their property, they could make no economically viable use. In *Penn Central* this court stated:

> "While the Commission's actions in denying applications to construct an office building in excess of fifty (50) stories above the Terminal may indicate that it will refuse to issue a certificate of appropriateness for any comparably sized structure, nothing the Commission has said or done suggests any intention to prohibit *any* construction above the Terminal. The Commission's report emphasized that whether any construction would be allowed depended upon whether the proposed addition 'would harmonize in scale, material, and character with [the Terminal].' (citation omitted) Since appellants have not sought approval

for the construction of a smaller structure, we do not know that appellants will be denied any use of the air space above the Terminal." *Id.*, pp. 136-7.

Thus, this Court refused to "apply" the ordinance to the Terminal site because it refused to assume that denial of a particular proposed structure would encompass within it projected denials of all future applications for any use whatsoever on the site. The instant case presents an even stronger reason for the same approach since appellants have not even approached the city for any permits. The propriety of the lower Court's refusal to deal with how the ordinance might apply to appellants' property in the absence of any administrative action by the city is thus amply supported.[9]

Appellants urge that constitutional principles in the area of land use regulation are so uncertain as to preclude predictability. (Juris. St., pp. 12 (fn. 7), 15-16.) Appellants' real difficulty is the lack of authority supporting their essential theme that excessive land use regulation requires compensation. Even an authority cited by appellants as a "widely acknowledged national authority on land use law" (Juris. St., p. 15 fn. 9) has been unable to cite any federal appellate case which sustains a constitutionally required award of damages based soley on excessive land use regulation. See Hagman and Misczynski, *Windfalls for Wipeouts* (1978) pp. 256-307. Furthermore, while this Court has recognized that it is difficult to come

[9]The propriety of utilizing available administrative procedures to eliminate or clarify issues prior to their presentation to a court has been recognized in other contexts. See, e.g., *California Comm'n v. United States* (1957) 355 U.S. 534, 539; *Allen v. Grand Cent. Aircraft Co.* (1954) 347 U.S. 535, 553; dissent of Chief Justice Burger in *Moore v. East Cleveland* (1976) 431 U.S. 494, 521.

up with easy formulas for resolving these kinds of cases (*Penn Central Transportation Co. v. City of New York, supra,* at p. 124) there is substantial predictability which renders many, if not most, fact situations subject to a predictable legal result. Thus, the general principle followed by the Court below is that land subject to regulation must remain capable of providing some economic benefit to its owners.[10] See, e.g., *Penn Central Transportation Co. v. City of New York, supra,* at pp. 137-8, *Hass Co. v. City and County of San Francisco* (9th Cir. Oct. 4, 1979) ..... F2d ..... (No. 77-2486), *South Terminal Corp. v. Environmental Protection Agcy.* (1st Cir., 1974) 504 F2d 646, 678, *Fred F. French Investing Co. v. City of New York* (1976) 385 N.Y.S. 2d 5, appeal dism'd., 429 U.S. 990. That principle was fairly applied in this case.

In sum then, the independent and alternative ground of the lower Court's opinion (the ordinance is constitutional and does not constitute a "taking" of appellants' property) is completely consistent with established doctrines of constitutional law and with the usual rules requiring available administrative procedures to be invoked prior to seeking judicial review regarding how an ordinance might be applied to specific property. It is respectfully submitted that this case does not present substantial or novel issues which warrant the attention of this Court. In fact, contrary to appellants' assertion (Juris. St., p. 30), they have had their day in court and the resolution of the issues they raised was in accordance with long established precedent.

[10]This Court's recent decision in *Andrus v. Allard* (November 27, 1979) ..... U.S. ....., 40 CCH S.Ct. Bull. B163, strongly supports the city's position. Thus the Court held, *inter alia:* "In the instant case it is not clear that appellees will be unable to derive economic benefits from the artifacts; for example, they might exhibit the

A Land Use Regulation Which Violates Substantive Due Process Requirements Is Invalid; There Is No Additional Constitutional Requirement That Affected Property Owners Be Awarded Compensation

The conclusion of the California Supreme Court that a landowner may challenge the constitutionality of a land use action by declaratory relief or mandamus but not through inverse condemnation is also a proper result and is not novel. Other states have previously reached this conclusion. In *Fred F. French Investing Co. v. City of New York* (1976) 385 N.Y.S. 2d 5, Appeal dism'd., 429 U.S. 990, the New York Court of Appeals stated:

> "As noted above, when the State 'takes', that is appropriates, private property for public use, just compensation must be paid. In contrast, when there is only regulation of the uses of private property, no compensation need be paid. Of course, and this is often the beginning of confusion, a purported 'regulation' may impose so onerous a burden on the property regulated that it has, in effect, deprived the owner of the reasonable income productive or other private use of his property and thus has destroyed its economic value. In all but exceptional cases, nevertheless, such a regulation does not constitute a 'taking', and is therefore not compensable, but amounts to a deprivation or frustration of property rights without due process of law and is therefore invalid." *Id.*, p. 8.

Thus, a requirement of just compensation in connection with constitutionally invalid land use actions was expressly rejected. Other New York decisions have followed the same

artifacts for an admissions charge. At any rate loss of future profits —unaccompanied by any physical property restrictions—provides a slender reed upon which to rest a takings claim." *Id.*, p. 179. In the instant case a more substantial and traditional use is allowed as a matter of right under the zoning regulation.

principle. See, e.g., *Charles v. Diamond* (1977) 392 N.Y.S. 2d 594; *Jensen v. City of New York* (1977) 42 NY2d 1079.[11] See also, *DeMello v. Town of Plainville* (Conn. 1976) 368 A.2d 71; *Gold Run Limited Ltd. v. Board of County Com'r* (Colo. 1976) 554 P.2d 317; *Davis v. Pima County* (Ariz. 1978) 590 P.2d 459 *cert. denied* (1979) 39 CCH 3178; *Eck v. City of Bismarck* (N.D. 1979) 283 N.W.2d 193.

The remedy of judicial invalidation of unconstitutional land use regulation strikes the appropriate balance between the interest of the public in receiving the benefit of regulations adopted by their representatives and private property rights which are protected by federal and state constitutions. The average member of a local governing body, elected by the people of a particular jurisdiction, is unlikely to support non-traditional or innovative land use actions which are arguably necessary in that community if there is any substantial risk that a court would subsequently determine that the affected properties had been "taken" thereby stating a claim for money damages in inverse condemnation. Under the invalidation approach local governing bodies can undertake such actions without being subject to the penalty of having inadvertently opened up the public treasury if they guessed wrong as to the constitutional line between valid regulations and compensable "takings". The constitutional rights of property owners are protected by their right to have unconstitutional land use actions invalidated by judicial action.

[11]The New York Court of Appeals followed this approach in its decision in *Penn Central Transportation Co. v. City of New York* (1977) 397 N.Y.S. 2d 914, which was subsequently reviewed by this Court. This Court was aware of the New York rule. *Penn Central Transportation Co. v. City of New York,* supra, pp. 120-121.

In this Court's decision in *Penn Central Transportation Co. v. City of New York, supra,* it was stated:

> "Indeed, we have frequently observed that whether a particular restriction *will be rendered invalid* by the government's failure to pay for any losses approximately caused by it depends largely 'upon the particular circumstances [in that] case'." *Id.,* p. 124. (Emphasis added).

This language appears in the introductory portions of the discussion concerning previous decisions of the Court on the subject of land use regulation. It is certainly not contended that *Penn Central* firmly resolved that invalidation is the remedy for an unconstitutional land use regulation, since the opinion did not reach that issue. However, the language does indicate, contrary to appellants' assertion, that the courts have traditionally approached land use restrictions from the standpoint of whether they are valid or invalid under constitutional standards.

Appellants would reverse this traditional approach. Instead, they assume that the law has required payment of just compensation where land use actions exceed constitutional boundaries. Thus, appellants assume that the courts have looked for a demarcation between permissible regulation and "unconstitutional taking requiring payment of just compensation". (Juris. St., p. 12). However, none of the three cases cited immediately following this statement ordered compensation to be paid. *Penn Central Transportation Co., supra; Goldblatt v. Town of Hempstead* (1962) 369 U.S. 590; *U.S. v. Central Eureka Mining Co.* (1958) 357 U.S. 155. In 1973, at the request of the Council on Environmental Quality (42 U.S.C. 4342)

Bossleman, Callies and Banta produced *The Taking Issue* (Council on Environmental Quality, 1973) as a study on the constitutional limits of governmental authority to regulate privately held land without payment of compensation. One of its conclusions illustrates appellants' error:

> " 'The myth' of the taking clause has always lured landowners to expect more from it than prior precedents really justify." *Id.* p. 232.[12]

In the same vein, appellants' vision of chaos and inequity as between California case law and cases from the federal courts and the courts of other jurisdictions is unfounded. The concepts and cases relied upon by appellants have little relevance to the decision of the lower Court in the instant case.

Typical of appellants' approach is their reliance on *Lake Country Estates v. Tahoe Regional Planning Agency* (1979) 99 Sup. Ct. 1171. Appellants assert that *Lake Country Estates* indicates that this Court, as well as lower federal courts, will entertain property owners' pleas for "monetary relief in the form of constitutionally promised just compensation." (Juris. St., pp. 25-26). In fact, insofar as relevant, *Lake Country Estates* held that a claim under the Civil Rights Act (42 U.S.C. § 1983) could be stated against the Tahoe Regional Planning Agency and its governing body members. This Court was not called upon and did not decide what remedies might be

[12]See also "Agins: A Step in the Right Direction" (Land Use Law and Zoning Digest, September 1979.).

appropriate under such a claim.[13] Of course, as previously pointed out, no claim has been asserted or argued under the Civil Rights Act in the instant case. Furthermore, there is nothing in the opinion of this Court in *Lake Country Estates* which indicates that inverse condemnation is constitutionally the only required remedy for excess land use regulation.

The history of the case reveals the opposite to be true. Lake Country Estates was one of four property owners involved in the consolidated opinion of the Ninth Circuit in *Jacobson v. Tahoe Regional Planning Agcy.* (9th Cir. 1977) 566 F.2d 1353. The Ninth Circuit, *inter alia*, rejected a cause of action for inverse condemnation. *Jacobson*, *supra*, at pp. 1358-59. While Lake Country Estates sought and received review by this Court, the propriety of the holding of the Ninth Circuit regarding inverse condemnation was not raised in the petition for certiorari and the decision did not deal with inverse condemnation. Finally, it should be noted, that in *Jacobson* the Ninth Circuit did hold that a claim had been stated under the due process clause and that the particular ordinance in issue could be reviewed to determine its validity. *Jacobson, supra,* at p. 1359, particularly, fn. 9. The opinion of this Court in *Lake Country Estates* acknowledged and did not alter this

[13]In fact, on remand in one of the cases consolidated for purposes of appeal in *Lake Country Estates* the Federal District Court ruled that money damages would be inappropriate in that action. *Jacobson v. Tahoe Regional Planning Agency,* United States District Court for the District of Nevada, Civil No. R-2947 BRT (Order Dismissing Second Amended Complaint, August 9, 1979). Money damages pursuant to claims under 42 U.S.C. section 1983 for "taking" may, however, be appropriate under some limited circumstances. *Monell v. New York City Dept. of Social Services* (1977) 436 U.S. 658, 687.

holding of the Ninth Circuit. See *Lake Country Estates v. Tahoe Regional Planning Agcy., supra,* at p. 1175. This latter holding by the Ninth Circuit is certainly consistent with the approach of the lower Court in the instant case.

Continuing, appellants suggest that federal case law indicates the propriety of just compensation as opposed to a remedy of invalidation. Appellants rely, however, on what can be characterized as public works type projects involving the physical appropriation of property rights. *Penn Central Transportation Co. v. City of New York, supra,* at p. 128. For example in *Hurley v. Kincaid* (1932) 285 U.S. 95, suit was brought by downstream owners to enjoin a flood control project on the ground that it would flood their property. This Court rejected an injunction but did conclude that construction of the project could require compensation for flooding. Not only does *Hurley* obviously fall into the physical invasion category, but also it is clear that where the government has determined to undertake a project an injunction could frustrate the governmental purpose. In that instance the recognition of damages is nothing more than an implementation of Congressional intent. *Dugan v. Rank* (1963) 372 U.S. 609 involved similar circumstances as does *U.S. v. Gerlach Live Stock Co.* (1950) 339 U.S. 725.

These cases have no application to judicial review of the validity of a zoning ordinance intended to regulate private property.

Two other cases sometimes cited for the proposition that federal courts award compensation are also inapplicable. In *Benenson v. United States* (Ct. of Claims 1977)

548 F.2d 939, the Court found that the sum total of governmental action aimed at preventing demolition of the Willard Hotel in Washington, D.C. so as to facilitate acquisition constituted a taking. There the government's intent almost from the beginning was to bring the hotel site into public ownership. Efforts by the owners to alter the building in any manner were prevented in order to preserve the government's options. Similarly in *Drake's Bay Land Company v. United States* (Ct. of Claims 1970) 424 F.2d 574, the Court held that Congress *intended* for the United States to acquire an inchoate interest in the property at the time legislation was enacted authorizing the Point Reyes National Seashore. P.L. 87-657. The later failure of governmental officials to expeditiously acquire the property coupled with their acts blocking development were held to justify an award of compensation.

In the instant case the owners have not been rejected in efforts to develop the property since they have never even asked the city for any approvals. The eminent domain action filed by the city was abandoned according to authorized statutory procedures. Therefore, the zoning ordinance stands on its own feet as an action which cannot be equated with any intent to acquire the property. *Benenson* and *Drake's Bay* fall into the category of activities which were so egregious as to cause the courts to recognize the intent of the government to acquire the property and simply implement that intent by judicial decree.[14]

[14]California law provides compensation to land owners in these circumstances also. In *Peacock v. County of Sacramento* (1969) 271 Cal.App.2d 845, the county had refused to permit any development of the land in question while assuring the owner that the restrictions were of no consequence because the county intended to acquire the property for an airport. When, after denying the owner any use of his property for five years, the county renounced its intent to acquire the land, the Court concluded that due to the "exceptional and extraordinary circumstances" the property had been taken by inverse condemnation. *Id.* at p. 854. See *HFH Ltd. v. Superior Court,* 15 Cal.3d 508, 517 fn. 14. This remedy of monetary damages through inverse condemnation for particularly egregious conduct by public agencies in anticipation of acquisition is not affected by the decision of the California Supreme Court in the instant case. Rather, the Court held that under the facts as alleged the city's activities did not constitute inequitable precondemnation actions leading to inverse condemnation. This is an eminently correct conclusion where the city's planning process was open and public and action was taken in a timely manner. In arguably more difficult circumstances courts have refused to award money damages. *City of Chicago v. Loitz* (Ill. 1975) 329 N.E.2d 208, *Macmor Mortgage Corporation v. Exchange National Bank of Chicago* (Ill. 1975) 332 N.E.2d 740. If the city's activities were deemed to constitute inverse condemnation no public agency would be able to undertake public discussion and consideration of possible acquisition. This could lead to the conspiratorial, backroom, non-public activities in anticipation of acquisition which did not occur in this case but which appellants imply from their assertions.

Likewise, appellants' attempt to portray various state cases as indicating chaos in this area of the law is thoroughly misleading. For example, some of the cases cited involve physical occupation of private property, a circumstance that has nothing to do with land use regulation. See *Brazil v. City of Auburn* (Wash. 1979) 598 P.2d 1 (Juris. St., p. 21). Other cases involve instances where the challenged regulation was actually upheld without any requirement of compensation. For example, in *Moviematic Inc. v. Bd. of County Com'rs.* (Fla. 1977) 349 S.2d 667, a restriction authorizing one single family residence per five acre parcel, an even more restrictive limitation than is involved in the instant case, was upheld without any requirement of compensation. See also *Village of Willoughby Hills v. Corrigan* (Ohio 1972) 278 N.E.2d 658 (height limit in the vicinity of an airport upheld without requirement of compensation). Other of the state decisions

cited by appellants are so peculiar on their facts as to be irrelevant to the instant cause.[15] For example in *Askew v. Gables-By-The-Sea, Inc.* (Fla. 1976) 333 S.2d 56, an earlier judgment entered between the State and private owners indicated that the right to fill and dredge the underwater lands involved had become a vested right. Therefore, *Askew* deals with a situation where a vested right (akin to an existing use) is totally frustrated. This has no relevance to governmental regulation of unimproved land. Perhaps most significantly, none of the cases cited held that compensation was due to affected private owners from the mere enactment of a zoning regulation.

Appellants' assertion that open space which would remain after property is developed is somehow a public use requiring compensation is thoroughly erroneous. (Juris. St., pp. 11 fn. 6, 16) As long ago as 1926, in *Gorieb v. Fox* (1926) 274 U.S. 603 (upholding building setback requirements without any provision for compensation), this Court stated:

[15]Likewise appellants' discussion of the *Keystone* cases from New York is inapposite. (Juris St. p. 21.) The basic decision in the Keystone Associates litigation was *Keystone Associates v. Moerdler* (1966) 278 N.Y.S.2d 185. There the Court invalidated New York's attempt to preserve a building occupied for 83 years by the Metropolitan Opera Association. The legislation created a private corporation and vested it with the power to condemn the particular property and appropriate it for the use as an auditorium. The Court struck down the statute and viewed it as an exercise of the power of eminent domain. *Id.* p. 188. To equate that situation with the instant case is inappropriate since in *Keystone* a statute was enacted aimed at a particular piece of property with the sole purpose of acquisition. The Court even concluded that the statute was not intended to protect public health, safety and welfare as those terms are commonly understood. *Id.* p. 188. In the instant case the zoning ordinance was part of a comprehensive planning process and applied to many parcels of land in the area.

> "It is hard to see any controlling difference between regulations which require the lot-owner to leave open areas at the sides and rear of his house and limit the extent of his use of the space above his lot and regulation which requires him to set his building a reasonable distance back from the street. Each interferes in the same way, if not to the same extent, with the owner's general right of dominion over his property. All rest for their justification upon the same reasons which have arisen in recent times as a result of the great increase and concentration of population in urban communities and the vast changes in the extent and complexities of the problems of modern city life. *Id.* p. 608.

In a more contemporary circumstance the validity of regulations which result in open space has been well explained. In *Friedman v. City of Fairfax* (1978) 81 Cal.App.3d 667, the California Court of Appeal held:

> "While a conceived objective of preserving a scenic, historical and singularly desirable open-space resource may result in confering a public *benefit,* such an otherwise valid purpose and attendant result is not the equivalent of a public *use* requiring compensation. So long as a rational basis exists for a zoning decision, the purpose or motive of the ordaining body becomes irrelevant to any inquiry into its reasonableness." *Id.* p. 677 (emphasis by the Court).

Nor does the fact that the power of eminent domain may be exercised by a city for the purpose of acquiring open space have the effect of rendering any open-space which is the result of regulation *ipso facto* a public use requiring compensation. Were this to be the law, then even the most mundane requirements for dedication (street purposes, for

example) as a part of a subdivision approval would result in comparable takings. Such is not the law. See, e.g., *Ayres v. City Council of Los Angeles* (1949) 34 Cal.2d 31.

CONCLUSION

For the reasons stated herein, this appeal should be either dismissed or the judgment affirmed.

Respectfully submitted

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Supreme Court, U.S.
FILED
DEC 22 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979
No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,
Appellants,

vs.

CITY OF TIBURON,
Appellee.

Appeal From the Supreme Court of California.

RESPONSE TO MOTION TO DISMISS OR AFFIRM.

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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,
Appellants,

vs.

CITY OF TIBURON,
Appellee.

Appeal From the Supreme Court of California.

RESPONSE TO MOTION TO DISMISS OR AFFIRM.

Introduction.

Before responding to Appellee's principal legal argument, a few preliminary observations seem in order:

First, it is difficult to reconcile Appellee's present ritualistic disparagement of the importance of the issues at bench with its earlier entreaties to this Court that this case is of such importance as to require advance circulation of drafts of Appellee's written endeavors to other California government counsel to get their comments on this important matter.[1]

[1]On October 22, 1979, Appellee wrote to this Court's Clerk, requesting additional time under Rule 34(5), justifying its request on the basis that ". . . The case is of great interest and importance to other governmental entities of the State of California and appellee desires to forward drafts of its motion to other counsel for review and comment before filing it with this Court."

Second, while Appellee now suggests a supposed lack of exhaustion of administrative remedies below, it fails to inform the Court that since what is in issue here is ". . . widespread and comprehensive zoning modifications . . ." (Motion to Dismiss or Affirm, p. 2[2]), under both California and Federal Constitutional laws that is a legislative not administrative matter (see, *San Diego Bldg. Contractors Assn. v. City Council* (1974) 13 Cal.3d 205, 118 Cal.Rptr. 146, 529 P.2d 570, *City of East Lake v. Forest City Enterprises* (1976) 426 U.S. 668), and no "administrative remedies" are involved (see *infra,* pp. 7-10).

Third, by means of lengthy footnotes, Appellee quarrels with the *factual* adequacy of Appellants' pleadings. Aside from the fact that such quarreling is without merit on its own premise (see fn. 3, *infra*), the short answer is that in the trial court Appellee sought and obtained a ruling sustaining its demurrer to Appellants' cause of action in inverse condemnation without leave to amend even once (a ruling obtainable only when it is clear that no facts can be possibly stated that give rise to a cause of action, the pleading giving rise only to an issue of law). Having thus successfully strived to limit Appellants' complaint to its present form, Appellee is scarcely in a position to scrutinize Appellants' factual pleadings *now,*[3] at the

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[2]Hereafter, cited as "Motion", followed by appropriate page number.

[3]The California courts have had this to say about such arguments:

> "It is unfair for a party to withhold an objection founded upon a defect, which, if pointed out in time, might be remedied, until it is too late to correct the defect, thereby inducing an opponent to rely upon his pleading as sufficient in order that he may have a fatal objection. Such a course is a fraud upon justice and prevents a fair trial. It is therefore not tolerated", *Asnon v. Foley* (1930) 105 Cal. App. 624, 630, quoting with approval from an earlier California Supreme Court decision.

As for this Court, Mr. Justice Holmes put in thus in *Davis v. Wechsler* (1923) 263 U.S. 22, 24:

> "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

[4]This seems an appropriate place to repeat the admonition of this Court in *U.S. v. Dickinson* (1947) 331 U.S. 745, 748-749:

> ". . . The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action'—when they are born, whether they proliferate, and when they die." *Id.* at 748.

[5]Two knowledgeable observations on this point warrant repeating. The first, ironically, came from the pen of one of the Justices who concurred in the opinion below:

> "No one ever devised an ordinance to preserve an urban ghetto or crowded central city environment; it is always to protect the outer city, the suburb, the middle or upper

(This footnote is continued on next page)

expense of the *legal issues* they admittedly raise.[4]

Fourth, the impact of the kind of exclusionary zoning involved here on an area's housing opportunities, contrary to Appellee's assertion (Motion, p. 7), figures in the opinion below. In a common sense observation, it was deplored by Mr. Justice Clark in his dissent (Jurisdictional Statement, Appendix A, p. 23). That Appellee would rather ignore this difficult topic, and deal instead with Appellants' arguments in a social, economic and ethical vacuum, is quite understandable from an advocate's tactical point of view, but viewed from a more detached vantage point, no reason appears why this Court which is looked to by the nation to set constitutional policy, should be asked to ignore such important policy factors—to say nothing of palpable reality.[5]

Fifth, contrary to Appellee's assertion (Motion, p. 8), the undisputed facts at bench demonstrate (Jurisdictional Statement, pp. 6-8) that this case *does* involve continuous legislative, regulatory, and acquisitory activity on the part of Appellee, impacting on the subject property, going all the way back to 1967 (Jurisdictional Statement, p. 6). The present action was thus brought only after a half-dozen years of intrusively regulatory and overtly acquisitory interference with the economic utility, value and saleability of the subject property. This is quite typical in California; the forces bent on bringing a brave new world of land regulation to the West Coast have discovered that the most potent weapon is protracted uncertainty, for no rational and prudent person will invest substantial sums without some soundly-based expectation of carrying his project through to completion, and as long as 'studies" are being made and regulations fluctuate, there is nothing for the courts to review, even though the market may be effectively destroyed.

An excellent example of this process is provided by *Arastra Limited Partnership v. City of Palo Alto*

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class housing development." Mosk, *Finding a Direction for Our Environment*, Barrister, Spring 1976, at p. 18.

The second was made by MIT's Urban Studies Professor Frieden in his book "The Environmental Protection Hustle" (1979, MIT Press), in the course of his study of environmentalist practices in Marin County (the area in which the Town of Tiburon is located):

> "Marin County, a wealthy suburb north of San Francisco, is the best place to look for an understanding of what it means to stop suburban growth in the name of environmental protection. It means closing the gates to people who may want to move in and, where possible, even to people who may want to visit; turning to state and federal governments for help in paying the costs of exclusivity; and maintaining a tone of moral righteousness while providing a better living environment for the established residents." *Id.*, p. 37.

(1975, N.D. Cal.) 401 F.Supp. 962, a case quite similar factually to the one at bench (*i.e.*, first municipal studies aimed at acquisition, followed by realization that the municipal acquisitory grasp exceeded its fiscal reach, followed by creation of high sounding "regulations" whose effect was a taking of the right of user, all of which took years before it even reached the level of finality that would permit judicial review; in the meantime, the afflicted landowner was required to bear all the economic burdens of ownership, such as maintenance, insurance, mortgage interest, and of course taxes, but was unable either to put his land to rational uses or to sell it at anything remotely resembling its fair market value). Of course, in *Arastra* there was a liability trial on the merits, and the court was able to make detailed findings;[6] here Appellants were denied a day in court.

Sixth, contrary to Appellee's assertion, Appellants do not contend that the award of just compensation in an inverse condemnation action is, or should be the only remedy. On the contrary, Appellants contend that the error below lies in the California Supreme Court's promulgation of a rigid, absolutist dogma that such remedy can *never* be obtained in cases of regulatory takings. Indeed, Appellants' presentation to this Court is premised on the urgent national need to eluci-

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[6]Aside from thus demonstrating the wisdom of letting such cases go to trial so that the facts may be truly explored on the *ad hoc* basis that this Court continues to favor (*Kaiser Aetna v. United States* (1979) .... U.S. .... (No. 78-738), *Arastra* also demonstrates the wisdom of the monetary remedy. As soon as the District Court spoke in that case, Palo Alto promptly came up with the money with which to purchase the parkland it wanted, whereupon after payment of substantial damages to the landowners, the cause never went to valuation trial, and the above opinion was vacated by stipulation; 417 F.Supp. 1125.

date authoritative criteria as to when such a remedy is appropriate, when it is mandatory, and when it is not available at all (Jurisdictional Statement, pp. 22-25).

Finally, it cannot go without emphatic notice that Appellee's presentation amounts to a studied disregard of the Constitution—both literally and in spirit—and seeks to deal with this case as if it were a matter of state administrative law. It wasn't, and it isn't. To its credit, the California Supreme Court candidly acknowledged that it was deciding a point of *federal constitutional law* (Jurisdictional Statement, Appendix A, pp. 6-8).

The Court below went out of its way to make it clear that it was deciding a constitutional issue of first impression (*Id.* at pp. 8-9); *i.e.,* whether in the face of a well-pled regulatory taking within the meaning of the Fifth Amendment, the constitutionally-mandated remedy of just compensation was or was not available.[7] In today's legal and regulatory climate (see Jurisdictional Statement, pp. 19-20) that is a most important issue, that is ripe for consideration by this Court.

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[7]Contrary to assertions in the Motion, the court below did *not* hold that the facts pled gave rise to no taking. Appellee's argument on this point mistakenly refers to the second holding below, that Appellants' *declaratory relief* count failed because it is available only to test *facial* constitutionality, whereas here the face of the ordinance passed muster (Jurisdictional Statement, Appendix A, pp. 12 et seq.). To the extent the court below dealt with remedies, it did and had to proceed on a premise that a taking had been alleged; otherwise there would be no basis on which to reach the issue of remedies.

I.

The Opinion Below Squarely and Expressly Decides a Federal Constitutional Issue of Prime National Importance, and Expressly Belies Appellee's Arguments Going to Supposed "Administrative Remedies".

The principal thrust of the Motion is the assertion that Appellants should have exhausted their supposed administrative remedies. For several reasons such arguments are without merits, and indeed, take improper liberties with the opinion below.

First, as noted *supra,* extensive area-wide zoning of the type involved here is, under California law, a legislative, not an administrative act. *San Diego Bldg. Contractors Assn. v. City Council, supra;* accord, *City of East Lake v. Forest City Enterprises, supra.* Therefore, inherently there are no "administrative" remedies to exhaust, since no administrative acts are involved. Appellee points to no provisions of the Ordinances involved here, as requiring or providing for any kind of administrative review or relief. Thus, Appellee's reliance on cases in which the legislation in question set up machinery for required administrative review are simply not on point. An individual constitutionally aggrieved by legislation is not required to supplicate the legislature—whether state or local—to change the law, before seeking an appropriate judicial remedy. Indeed, where deprivation of *constitutional* rights is charged, this Court made clear that no pursuit of administrative remedies is required. *Damico v. California* (1967) 389 U.S. 416.[8]

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[8]Of course, *Damico* was an action brought under the Civil Rights Act which is merely a statutorily created remedy for

(This footnote is continued on next page)

Second, where, as here, the governmental acts constituting a taking come about after a lengthy, considered and deliberate course of action, that after extensive studies announces its avowed policy and intent to bring about the very conditions that the aggrieved landowner charges to be a taking, no pursuit of chimerical administrative "remedies" is required, even on Appellee's unsound premise. See *Dahl v. Palo Alto* (1974, N.D. Cal.) 372 F.Supp. 647, 649, *Cordeco Dev. Co. v. Vasquez* (1972, D.P.R.) 354 F.Supp. 1355, 1357-1358, aff'd. (1976, 1st Cir.) 539 F.2d 258.

Finally, and most importantly, the court below made it explicitly clear that no "administrative" remedies are involved here. To the extent Appellee suggests otherwise, its arguments are disingenuous. What Appellee has failed to tell this Court is that when the opinion below was originally written, the California Supreme Court inadvertently referred to the remedy of "adminis-

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deprivation of constitutional rights, that is applicable to regulatory takings. *Lake Country Estates v. Tahoe Regional Planning Agency* (1979) .... U.S. .... [59 L.Ed.2d 401]. Please note that if the label to be applied to such actions (*i.e.,* "civil rights action" vs. "inverse condemnation action") is to be given any *substantive* significance, the obvious response will be to cast one's action in the "civil rights" rubic and take it to the federal courts where the initial pleader gets to control the theory of the case as explained in *Bell v. Hood* (1946) 327 U.S. 678, 681 (". . . The party who brings a suit is master to decide what law he will rely upon. . . ."); *Dahl v. City of Palo Alto* (1974, N.D. Cal.) 372 F.Supp. 647, 649, fn. 2 (Jurisdictional Statement, pp. 25-27).

trative mandamus"[9]—(original opinion below was first printed at 23 Cal.3d 605). However, before that opinion became final, the inadvertence was called to the California Supreme Court's attention and the Court immediately corrected its opinion by striking all references to "administrative" mandamus (a copy of the order below thus correcting the majority opinion is attached hereto as Appendix A). The corrected opinion appears at 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25.

Moreover, it is nothing short of shocking to behold Appellee's argument on this point, because in the court below, Appellee *expressly* requested that the constitutional issue of proper remedy under the taking clause be considered and decided; Appellee's Petition for Hearing in the California Supreme Court concluded as follows:

> "Petitioner further respectfully submits that the effective enforcement of state mandated, and local, land use regulations urgently requires that the uncertainty and confusion created by such cases as *Eldridge* and that now before this Court, be resolved; that the day has arrived when the question raised in footnote 16 of this Court's opinion in *HFH, Ltd.,* ought to be answered." Respond-

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[9]"Administrative mandamus" is the statutory review procedure of *administrative* acts (Cal. Code Civ. Procedure §1094.5). By long standing and well settled California law, this is a remedy limited to judicial review of administrative matters and is not available to review legislative acts. See *Wulzen v. Board of Supervisors* (1894) 101 Cal. 15, 35 P. 353, *Strumsky v. San Diego County etc.* (1974) 11 Cal.3d 28, 35, fn. 2, 112 Cal.Rptr. 805, 809, 520 P.2d 29. For an explication of the California legislative intent in adopting Cal. Code Civ. Proc. §1094.5, see *Brock v. Superior Court* (1952) 109 Cal.App.2d 594, 598-601, 241 P.2d 283.

ent's Petition for a Hearing by the [California] Supreme Court, p. 13, footnote containing the citation to the *HFH* case omitted.[10]

The court below acceded to this request, reached the constitutional issue thus tendered by Appellee (Jurisdictional Statement, Appendix A, pp. 8-9), and decided it on the merits, recognizing in the process that it was dealing with an issue of federal constitutional law (*Id.*, pp. 7 *et seq.*). Yet now, Appellee blandly asserts (Motion, p. 8) that the decision below is ". . . An Application of Established Constitutional Doctrine and Is Not Novel In Any Respect". Appellants respectfully suggest that Appellee's present argument cannot be reconciled with its position below nor, indeed, with the obligation of government counsel to present to the courts "a full and fair record" (see A.B.A. Code of Prof. Responsibility, Canon 7, Ethical Consideration 7-14).

There is simply no "administrative remedies" issue involved here, as the court below made crystal-clear.

The opinion below deals with an important, widespread and vexing constitutional issue that has caused a pervasive split among state courts attempting to select remedies under the Fifth Amendment's taking clause (Jurisdictional Statement, pp. 19-22). The nation needs guidance from this Court, and the instant case provides an appropriate vehicle by which to afford it. Appellee's arguments simply ignore this aspect of the case.

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[10]Footnote 16 in *HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 518, 125 Cal.Rptr. 365, 542 P.2d 237, reserved for another day the specific issue of whether an inverse condemnation action lies where a regulation deprives the subject property of substantially all reasonable use.

2.

Appellee's Arguments Ignore the Pervasive Inconsistency in the Law, and Beg the Issue Before the Court: Is Invalidation the Only Remedy in Regulatory Takings?

Appellants have presented the issue of whether the California Supreme Court's absolutist view on remedies available for a taking within the meaning of the Fifth Amendment is consistent with the "just compensation" guarantee. In response, Appellee launches into a lengthy and one-sided "analysis" of the issue which ignores those decisions that do not happen to fit its thesis.[11]

Appellants' short response is that such arguments are more properly made in a brief on the merits. Appellee ignores the importance of the issue on which it prevailed below, and now asserts how it would like this Court to rule on it. But the fact that *some* state courts have ruled on the issue in a manner to Appellees' liking, and that Appellee thinks it can distinguish *some* of the lower court cases that are not to its liking, can hardly obscure the fact that pertinent

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[11]Appellee's intellectual smorgasbord strategy extends to decisions of this Court and the federal courts. Note that the numerous federal court decisions collected at Jurisdictional Statement, p. 26, fn. 18, are simply ignored, while Appellee proceeds to quarrel with the *Benenson* and *Drakes Bay* cases (Motion, pp. 17-18), on which Appellants did not rely. Similarly, this Court's most recent and most definitive decision on remedies for non-physical taking (*i.e., The Regional Rail Reorganization Act Cases* (1974) 419 U.S. 102) is simply ignored, while Appellee goes on at length about the supposed difference between physical and non-physical takings, thereby also ignoring this Court's expression in *U.S. v. General Motors* (1945) 323 U.S. 373, 377-378, and attempting to revive the archaic physical v. non-physical taking dichotomy which has earned for itself a torrent of scholarly criticism (for an excellent collection of such critical commentaries, see Berger, *To Regulate or Not to Regulate — Is That the Question?* 8 Loyola of L.A. L. Rev. 253, 258-259 (1975)).

law is in a state of outright conflict on which the nation urgently needs this Court's definitive guidance.

There may well be *some* factual situations in which invalidation is appropriate, but there are others in which it is idle (particularly as here, where there are acquisitory overtones)[12] or ineffective, or in which the very time-consuming process of establishing the regulations' invalidity works a temporary *de facto* taking (see, *e.g., Keystone Associates v. State* (1972, App.Div.) 333 N.Y.S. 2d 27, aff'd. (1973, N.Y.) 307 NE 2d. 254, *Gordon v. City of Warren* (1978, 6th Cir.) 579 F.2d 386, *Sixth Camden Corp. v. Township of Evesham* (1976, D.N.J.) 420 F.Supp. 709.

The national problems stressed by Appellants (Jurisdictional Statement, pp. 19-22) continue to plague the nation. Since the Jurisdictional Statement was prepared, additional state courts have spoken to the issue of remedies. In *Eck v. City of Bismarck* (1979, N.D.) 283 N.W. 2d 193, the court expressly declined to follow California's absolutist position adopted in the opinion below (283 N.W. 2d at 201), and (while adhering to the view that invalidation is the preferred remedy in ordinary zoning disputes) expressly suggested the availability of inverse condemnation remedies where the ostensible regulation—as here—has acquisitory

[12]Since Appellants did not present here the issue of inverse condemnation liability arising from inequitable precondemnation activities, they do not believe it appropriate to debate it. It must be noted, however, that in launching into this non-issue (Motion, p. 19, fn. 14), Appellee relies on Illinois law (which is contrary to the construction of the Fifth Amendment by this Court—*cf. U.S. v. Reynolds* (1970) 397 U.S. 14, 16—and to the Uniform Relocation Assistance Act which forbids payment of supposed market value which is depressed by precondemnation activities and publicity—see 42 U.S.C. §4651(3)), without making clear to the Court that the Illinois rule constitutes a minuscule minority view.

overtones. Moreover, the North Dakota court properly remanded the cause so that the aggrieved owner confronted with this first-impression decision could amend her pleadings accordingly. Compare the case at bench where the owners were simply denied a day in court.

Also, the Maryland Court of Special Appeals affirmed the award of substantial damages in *Prince Georges County v. Blumberg* (1979) .... A.2d .... (No. 152, September Term 1979, opinion filed November 7, 1979). *Blumberg* illustrates well the abuses to which ostensible regulation can be put, and the damages inflicted thereby, that cannot possibly be rectified by invalidation of the wrongful regulation.

Appellants therefore respectfully urge that precisely because parties claiming to construe the federal Constitution are able on the state of existing law to pick and choose from openly conflicting judicial approaches to the problem of remedies without reliable guidelines promulgated by this Court, the issue of remedies for an uncompensated taking is a most important one, and it warrants consideration on the merits and decision by this Court.

Appellee has simply not addressed the importance of the issues presented here.

Conclusion.

Review on the merits by this Court is urgently needed because the law of remedies is unclear to the point of total lack of guidance. Moreover, if the law of inverse condemnation is to continue along the path laid down by this Court (*i.e.,* on a case by case, *ad hoc* basis), it is no more than compliance with the fundamental notions of fairness enshrined in the

concept of due process that aggrieved property owners be afforded a day in court so that they can fairly present the specific facts of *their* case.

Appellants respectfully pray, that the Motion be denied and that probable jurisdiction be noted.

Respectfully submitted,

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APPENDIX A.

Modification of Opinion. (Filed May 17, 1979)

In the Supreme Court of the State of California.

Donald W. Agins et al., v. City of Tiburon et al., Defendants and Respondents. S.F. 23866 Super. Ct. No. 75873.

BY THE COURT:

The opinion herein, filed March 14, 1979, is modified as follows:

1. On page 1, line 9, delete "administrative" from the phrase "administrative mandamus."

2. On page 8, line 11, delete "administrative" as above.

3. On page 16, line 15, delete "administrative" as above.

4. On page 20, line 3, delete "administrative" as above.

Supreme Court, U. S.
FILED
FEB 21 1980
MICHAEL RODAK, JR., CLERK

IN THE

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October Term, 1979
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DONALD W. AGINS and BONNIE G. AGINS,

Appellants,

vs.

CITY OF TIBURON,

Appellee.

On Appeal From the Supreme Court of California.

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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,

Appellants,

vs.

CITY OF TIBURON,

Appellee.

On Appeal From the Supreme Court of California.

APPELLANTS' BRIEF.

THE OPINION BELOW.

The opinion of the Supreme Court of California is reported at 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25. It is set out in Appendix A to the Jurisdictional Statement.

JURISDICTION.

The judgment of the Supreme Court of California became final as to that court on May 17, 1979. The Notice of Appeal to this Court was timely filed on July 6, 1979. On July 18, 1979, Mr. Justice Stevens extended Appellants' time to docket the appeal in this Court to October 12, 1979. The Jurisdictional Statement was filed October 11, 1979. This Court noted probable jurisdiction on January 7, 1980. Jurisdiction of this Court is invoked by 28 U.S.C. §1257(2).

Cases sustaining jurisdiction of this Court are:

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978);

Moore v. City of East Cleveland, 431 U.S. 494 (1977);

Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962);

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926);

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. *Fifth Amendment, United States Constitution:* ". . . nor shall private property be taken for public use, without just compensation."

2. *Fourteenth Amendment, United States Constitution:*

"Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

3. The City's open space ordinance, Ordinance 123 N.S., is set forth in Appendix D to the Jurisdictional Statement.

4. Ordinance 124 N.S. which rezoned Appellants' property into the open space category is set forth in Appendix E to the Jurisdictional Statement.

QUESTIONS PRESENTED.

1. Do the Fifth and Fourteenth Amendments prohibit the California Supreme Court from holding that monetary relief is *never* available when state regulatory action deprives an owner of land of all its value and use?

2. Does it violate the Fifth and Fourteenth Amendments for the California Supreme Court to provide that judicial invalidation is the only remedy for a landowner whose property has been taken by excessive regulatory acts?

3. Where a state regulation recites that certain uses can be made of private property does the property owner have a right under the Fifth and Fourteenth Amendments to allege and to prove that those recited uses are neither possible nor feasible and that he, therefore, has no available use at all?

4. Where California, by statute, authorizes cities to condemn private property for open space, can the City of Tiburon, without violating the Fifth and Fourteenth Amendments, acquire such open space use without payment to the property owner by use of its regulatory powers?

5. On the facts at bench, where the Appellants' property was stultified by regulation into uselessness and worthlessness, does the constitutional policy of fairness require that the ensuing economic burden be borne by the benefited public as a whole and not be disproportionately placed on Appellants?

STATEMENT OF THE CASE.

This appeal arises from the California Supreme Court's affirmance of the dismissal of Appellants' inverse condemnation and declaratory relief action. Thus, the substantive facts are those alleged in Appellants' Complaint plus the two City ordinances of which the California courts took judicial notice. For purposes of the appeal, the facts which are alleged are taken as true under both Federal and California law.

Appellants own five acres of undeveloped land within the City of Tiburon which they purchased for residential development. Except for the restrictive ordinances adopted by the City, this property would have been available and adaptable for such residential uses. The five acres are classified as "ridgelands" and possess a magnificent view of San Francisco Bay and the surrounding areas. (J.A. 4, 5)[1]

The City of Tiburon is in Marin County, California, on the north edge of San Francisco Bay. It is one of the smaller cities of California, containing only 1,676 acres. Its population is 6,209 according to the 1970 census. The City's favorable climate, aquatic facilities, proximity to the San Francisco Metropolitan area and sweeping view of San Francisco bay make it one of the most desirable places to live within California. It has one of the highest land values per acre of the suburban areas of the State. (J.A. 4) Of the undeveloped acreage within the City, appellants' five acres are among the most desirable and contain among the best views. (J.A. 4)

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[1]This is a reference to the Joint Appendix at pages 4 and 5. References to the Appendices to the Jurisdictional Statement will also be made, *e.g.* (J.S.A. ....).

In 1959, California enacted Sections 6950-6954 of the Government Code which specifically authorize the acquisition of private property by local government for open space purposes. These open space purposes are declared to be public uses. The exercise of the eminent domain power to acquire property for open space is specifically authorized. (J.S.A. 47-51)

Commencing in 1967, the California Legislature enacted provisions in the Government Code giving authority for cities and counties to adopt General Plans for land use and setting forth the scope of such General Plans. In 1970, these provisions were amended to provide that General Plans must include Open Space Elements to be in accordance with the Local Open Space Plan provisions of the Government Code. (J.S.A. 51-52) In 1972, the Legislature adopted Government Code Section 65302.2, making mandatory the adoption of General Plans with Open Space Elements.

Also in 1970, California enacted provisions in its Government Code requiring every city to adopt an open space zoning ordinance. (J.S.A. 50-51)

In January, 1972, the City employed Dean Witter & Company, Incorporated ("Witter") to prepare a plan so the City could finance the acquisition of property to own and hold for open space purposes. (J.A. 6) Witter prepared that plan and submitted it to the City which approved it. This plan identified the Agins' property as part of the total property to be acquired from the funds that were to be raised by a bond issue. (J.A. 6) The bond issue was approved, and the bonds were sold. The City used the funds obtained to purchase for open space the land adjacent to the Agins. The City, however, did not purchase the Agins' five acres. (J.A. 7)

During this same period in the first part of 1972, the City employed the planning firm of Williams & Mocine ("Williams") to prepare an Open Space Plan. Williams submitted its Open Space Plan to the City in October, 1972. (J.A. 7) It identified the Agins' five acres as "indispensable to and necessary for the open-space plan" of the City. Further, it stated that the Agins' property be purchased by the City to meet the requirements of the City's proposed open space ordinance. (J.A. 7)

To carry out the recommendations of Witter and Williams, the City, on October 25 and 26, 1973, adopted resolutions declaring it to be in the public interest and necessity that the City acquire by condemnation for open space the Agins' five acres and the twenty-five adjoining acres. Six weeks later, on December 4, 1973, the City filed its Complaint in eminent domain against Appellants seeking to acquire their five acres for public use, namely, for open space. (J.A. 9-10)

In the year that followed, the City altered not its objective but its method for keeping the Agins' property in open space. Rather than proceed to trial of the eminent domain proceeding, the City, in November, 1974, filed a notice of abandonment, as the result of which the case was completely dismissed. (J.A. 9-10) Since that time the City has relied upon its zoning ordinances, 123 N.S. and 124 N.S. to accomplish the City's aims and objectives of preserving the Agins' five acres in open space. (J.A. 11)

On June 28, 1973, the City adopted Ordinance 123 N.S. It created a special restrictive zone for open space purposes known as "Residential Planned Development and Open Space Zone". By its language it pur-

portedly authorized (1) one-family dwellings; (2) open space uses; and (3) accessory buildings and accessory uses. Density of buildings was limited to not less than one unit per five acres nor more than one unit per acre. Also on June 28, 1973, the City adopted companion Ordinance 124 N.S. by which particular parcels of undeveloped land, including the Agins' five acres, were placed into this zoning. (J.S.A. 41-46, J.A. 6)

The five acres owned by the Agins were never purchased or otherwise formally acquired by the City. Rather, the Agins continue as the ostensible record owners of the property. But because of the restrictions of Ordinance 123 N.S., they are unable to make any use whatsoever of their property. The City's actions have completely destroyed the value of their property for any purpose or use by them whatsoever and have prevented any sale, use, transfer or development of the property or any part of it (except, presumably, a transfer by gift to the City for open space purposes). (J.A. 8)

The Complaint in this case was filed June 16, 1975. (J.A. 2, 4) It alleged two causes of action. The first was that the result of the City's actions has been the taking of their property without payment of just compensation in violation of their Federal and State Constitutional rights and that they should have judgment for their just compensation which they alleged to be $2,000,000. (J.A. 12) The second was for a declaratory judgment that the Open Space Zoning Ordinance was invalid because confiscatory and in excess of the City's authority. (J.A. 12)

The City demurred to the Complaint. (J.A. 2) The trial court sustained the demurrer without leave to

amend as to the cause of action for inverse condemnation and sustained the demurrer on the cause of action for declaratory relief with leave to amend. (J.A. 2) The Agins declined to amend their Complaint, and the trial court thereupon entered a Judgment of Dismissal of the action on May 5, 1976. (J.S.A. 25, J.A. 2)

The Agins appealed to the California Court of Appeal. On April 24, 1978, it reversed the Judgment of Dismissal of the inverse condemnation cause of action and affirmed the Judgment of Dismissal of the declaratory relief cause of action. The City then petitioned the California Supreme Court for a hearing. A hearing was granted which vacated and expunged the opinion of the Court of Appeal.

The California Supreme Court, by its opinion, affirmed the dismissal by the trial court of both the first and second causes of action, holding that Appellants were not entitled to relief in either inverse condemnation or declaratory relief. (J.S.A. 1-15) Justice Clark dissented. (J.S.A. 16-24)

The Agins alleged in their Complaint that the restrictions upon their property to the uses of ordinance 123 N.S. deprived them of all use and all value of their property. In effect, they claimed that, because of the zoning, their property lost all its economic use and value for one-family dwellings, for open space uses, or for accessory uses. (J.A. 6) The California Supreme Court, in ruling upon those allegations of the first cause of action in inverse condemnation, treated

them as true, that is, that no economic use or value existed for the property under that zoning.[2]

As to the inverse condemnation cause of action the California Supreme Court held that even when all value and use of property is destroyed by a land use regulation the property owner cannot *ever* have a right to just compensation; his sole and exclusive remedy is to challenge the regulation's validity by a mandamus or declaratory relief action. (J.S.A. 6) It stated that even if the allegations of the Agins' Complaint were proved as true, they would have no right to compensation. In effect, the Court held that monetary compensation to the property owner is not available even when the use and value of his property has been taken for the benefit of the public at large by a confiscatory land use zoning or regulation.

This appeal followed.

SUMMARY OF ARGUMENT.

First: this Court's settled precedents are clear that allegations of takings give rise to issues of fact, that call for resolution on the merits, and do not lend themselves to disposition on the pleadings. This settled rule has gained much force from the Court's more recent commitment to an avowedly *ad hoc*, highly fact-

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[2]However, when the California Supreme Court considered the validity of the zoning under the second cause of action for declaratory relief, it stated, in contradiction of the allegations of the Complaint, that the ordinance on its face purported to give some economic use to their property. The Court ignored the allegation of the Complaint that, as applied to their property the zoning was confiscatory.

dependent case by case approach to cases of this type. The trier of fact must be permitted to hear evidence and draw factual inferences, because economic or physical reality may contradict the availability of uses purportedly permitted by the challenged regulation.

Second: the decision below rests on a misunderstanding of the nature of governmental power to deal with private property. The power to take is an inherent attribute of sovereignty that operates independently of the Constitution which, insofar as pertinent here, only imposes the limitation that just compensation be paid. The government may take private property by condemnation, seizure or legislation—intentionally or inadvertently. Whether a taking has occurred is then determined from the effect on the property, not by looking to subjective governmental intent. But however the taking is accomplished, it is neither "lawful" nor "wrongful"; it is but an exercise of an inherent power of sovereignty. If the taking is for a purpose legislatively authorized, whether expressly or by implication, the courts do not pass on the wisdom of the legislature in either setting a policy goal or in its choice of means; they award just compensation.

In the case at bench, the California Legislature authorized acquisition of private property for open space purposes and expressly forbade such acquisition without just compensation for any ensuing taking or damaging. Thus, no sound constitutional basis exists for holding such exercise of peculiarly legislative prerogatives to be invalid.

Third: the substantive criteria of a non-physical taking, enumerated by this Court in *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104,

124 *et seq.* (1978) and in *Kaiser Aetna v. United States,* ..... U.S. ..... [100 S.Ct. 383, 390] (1979) are met here. Not only is the alleged impact on the landowners totally confiscatory and their reasonable investment-backed expectations frustrated, but also the regulation in question effects a governmental acquisition of open space land resources. Moreover, this record is replete with extensive and overt governmental acquisitory purpose and conduct aimed at the transformation of this private land into "open space" declared by the legislature to be a public purpose supporting the exercise of eminent domain upon payment of just compensation.

Fourth: settled law and sound, historically-rooted policy favor awarding just compensation as a judicial remedy for taking of private property. In all cases in which the issue of remedies arose, this Court so held. Beyond that, powerful policy reasons continue to favor such an approach. The remedy of invalidation would require the courts to determine on an ongoing basis what legislatures may or may not enact; an approach violative of the historical view of the judicial invalidation power as one of strict necessity to be invoked only where unavoidable. Beyond that, such an approach would put the courts in a position of having to strike down potentially vital governmental programs of far-reaching importance, with potentially calamitous consequences if such programs were found to trench on protected property rights of even one citizen, without compensation.

Moreover, the remedy of just compensation leaves the regulating entity with a variety of economically ameliorative responses. The regulations can be amended to eliminate the objectionable features, or the entity may acquire such rights, and only such rights of the

[former] owner as are necessary to the carrying out of the governmental purpose. Even in the cases of the most egregious constitutional violation, where governmental disregard of the rights of the property owner is so severe as to work a complete taking, the governmental entity acquires a valuable resource for its payment of "just compensation", which leaves its balance sheet unchanged. Such entity has the further option of reselling the land so acquired for uses compatible with its regulatory purposes.

Finally, land use regulations in some regions of the country have grown so complex and multi-tiered that invalidation becomes literally or economically impossible, particularly where—as in California—the regulation can be changed at any time, even after the owner has established his right to proceed with the use of his land under the old regulation. California courts, moreover, simply refuse to invalidate any land use regulation, no matter how egregious; there have been no reported invalidation cases (on grounds of taking) in that state for almost two decades, and the most recent case on point erects well nigh insurmountable litigational barriers that preclude even an inquiry into the regulatory entity's bad faith in enacting the complained-of regulation.

ARGUMENT.

1.

SETTLED LAW AND THIS COURT'S COMMITMENT TO A HIGHLY FACT-DEPENDENT CASE BY CASE APPROACH TO INVERSE CONDEMNATION CASES MILITATE IN FAVOR OF A STRONG POLICY FAVORING TRIALS OF CLAIMS OF TAKINGS ON THE MERITS.

This Court's adherence to deciding inverse condemnation cases on an *ad hoc,* case by case basis, with decisions heavily dependent on the facts and factual inferences of each controversy, is now well established. *United States v. Central Eureka Mining Co.,* 357 U.S. 155, 168 (1958); *Goldblatt v. Hempstead,* 369 U.S. 590, 594 (1962); *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 123-124 (1978); *Kaiser Aetna v. United States,* ..... U.S. ..... [100 S.Ct. 383, 390] (1979). Also see, *Andrus v. Allard,* ..... U.S. ..... [100 S.Ct. 318, 327] (1979) (resolution of taking claims ultimately calls as much for the exercise of judgment as for the application of logic).

Thus, it seems only fair that an aggrieved property owner faced with having to make out a case for relief against so uncertain a standard, should be allowed his full day in court to prove his case. This Court has repeatedly so held: *Cuyahoga River Power Co. v. Akron,* 240 U.S. 462 (1916); *Mosher v. Phoenix,* 287 U.S. 29 (1932). Both *Cuyahoga* and *Mosher* made it clear that in order to determine whether a plaintiff who claims an uncompensated taking of his property can make out a case for relief, it is necessary for the trial court to take jurisdiction of the case and try the matter on the merits (240 U.S. at 464, and 287 U.S. at 32).

Of particular interest on this point is *Portsmouth Harbor L. & H. Co. v. United States,* 260 U.S. 327 (1922), for there the Court was presented with the claim of a plaintiff who twice before sued, claiming a taking, only to be rebuffed by this Court both times (see 260 U.S. at 328). Nevertheless, since he alleged new facts tending to show a governmental purpose to subordinate his land to the government's use of a nearby naval gun battery, he was held entitled to a trial on the merits. Said Mr. Justice Holmes, speaking for the Court's majority:

> "As we have said, the intent and the overt acts are alleged, as is also the conclusion that the United States has taken the land. That we take to be stated as a *conclusion of fact,* and not of law, and as intended to allege the actual import of the foregoing acts. In our opinion the specific facts set forth would warrant a finding that a servitude has been imposed," 260 U.S. at 330, emphasis added.

It is important to note that the Court went on to observe that the plaintiff's evidence might not be capable of proving their allegations, but it was not proper to ". . . pronounce it impossible upon demurrer." *Id.*[3] In the case at bench the allegations are that the challenged regulation deprived Appellants' property of all value and utility. That is a charge heavily dependent on factual evidence (including expert testimony by engineers, appraisers and land economists). Such issues

[3]The soundness of that observation is illustrated by *Cordeco Development Corp. v. Vazquez,* 354 F.Supp. 1355 (1972, D.P.R.) where a claim for relief under a taking theory was properly stated, but evidence eventually disclosed that changing economic conditions undid the monetary harm: *Id.,* 539 F.2d 258, 260-261[3] (1976, 1st Cir.).

do not lend themselves to rational resolution by demurrer; they call for trial on the merits.

In sum, fairness to the party bearing the burden of proof, logic and this Court's decisions, support the policy that all doubts ought to be resolved in favor of permitting an aggrieved landowner to have his day in court and be afforded a fair chance to prove a taking of his property before a trier of fact.

2.

THE EMINENT DOMAIN POWER OPERATES AS AN INHERENT ATTRIBUTE OF SOVEREIGNTY; ITS EXERCISE AND COMPENSATORY ATTRIBUTES ARE NOT DEPENDENT ON A PRIOR DETERMINATION OF ANY "WRONGFULNESS" OR "LAWFULNESS" OF ITS EXERCISE.

The Fifth Amendment does not forbid or authorize takings, for they are but a manifestation of the inherent power of the sovereign. The Constitution only imposes limitations. *Mississippi & Rum River Boom Co. v. Patterson,* 98 U.S. 403, 406 (1878); *Nichols on Eminent Domain,* Vol. 1, §1.14[2]. Nor does the Constitution require that the taking power be exercised in any particular fashion; the taking may be effected by condemnation proceedings, *by legislation*—directly or by implication[4] (see *United States v. Lynah,* 188 U.S. 445, 465-466 (1903)), or simply by naked seizure. But whichever way the power is exercised, it is a taking

[4]Legislation may work a taking intentionally (see, *e.g., Rocca v. United States,* 500 F.2d 492, 496 (1974, Ct. Cl.); compensation awarded where a taking occurred by ". . . an act of Congress itself whereby Congress declared that . . . the United States was immediately vested with all right, title and interest in real property . . ." within designated boundaries), or it may work a taking inadvertently, as in *The Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974). Also see *Lynch v. United States,* 292 U.S. 571, 579 (1934).

and, as an act of inherent power of government, it is *not* wrongful or tortious; the government may do just that (*United States v. Dow,* 357 U.S. 17, 21 (1958). In such situations the aggrieved owner's remedy is an inverse condemnation action. *United States v. Dow, supra, Buffalo River Conservation v. National Park Service,* 558 F.2d 1342, 1344 (1977, 8th Cir.), *Gardner v. Harris,* 391 F.2d 885, 887, 888, fn. 11 (1968, 5th Cir.). The fact that the governmental conduct, had it been engaged in by a private party, could have been branded as "wrongful" does not alter the fact that the government in such situations is only exercising its inherent power not possessed by private parties, and hence *it* is acting properly—subject, of course, to its constitutional obligation to pay just compensation for what it takes.

In other words, when the government takes property (*by whatever means*) it is a meaningless endeavor to engage in characterizations of its conduct as "wrongful" or "lawful". The concept is not unlike the inherent governmental war-making power; a particular war may be the proper subject of moral debate as "just" or "unjust", as "defensive" or "aggressive", but however characterized, the point is that it is up to Congress to declare war and once it exercises that inherent power that is entrusted to it, such characterizations have no impact on its legality. It is a political question, and so is the exercise of the taking power; see, *Rindge Co. v. County of Los Angeles,* 262 U.S. 700, 709 (1923). The point at bottom is that one deals here with an inherent

governmental *power* (whose exercise has been entrusted to the legislature),[5] and therefore, when a taking occurs, the question is whether just compensation has been paid.

The point is splendidly made by *Tektronix, Inc. v. United States,* 552 F.2d 343 (1977, Ct. Cl.). There, the government engaged in what among private parties would undoubtedly be branded as an act of industrial piracy; it brazenly proceeded to have copied for itself a superior electronic device in order to spare itself the need of having to pay its inventor the premium that its superior quality commanded in the market. In so doing, the government infringed several patents (see *Tektronix, Inc. v. United States,* 445 F.2d 323 (1971, Ct. Cl.) for the factual background). Yet, what in other circumstances would have been a tort (and might well have engendered a claim for punitive damages) was here simply a governmental taking of the patents, and the aggrieved inventor-manufacturer was held entitled to "just compensation" measured as in any other taking (see 552 F.2d at 347), rather than by loss of profits which might have been recoverable in a tort action

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[5]In the case at bench this point need not be debated, because the California Legislature expressly endorsed the creation of open space as a desirable social policy (see *Berman v. Parker,* 348 U.S. 26 (1954)), and has authorized its acquisition by eminent domain. See Cal. Gov't. Code §§6950, 6952, 6953. Indeed, the California Legislature went out of its way to direct that these statutes *not* be applied so as to work a taking or damaging without payment of just compensation. See Cal. Gov't. Code §65912. Thus, that the City of Tiburon may take private property for public use, and that open space is one species of such legislatively declared public use, cannot be the subject of rational debate in the case at bench.

against a private party (see 552 F.2d at 349-351). Thus, a major error of the court below lies in its unsupported and unwarranted assertion that the taking power is exercised either properly or wrongfully, and its conclusion that it is only in the former case that "just compensation" is awarded, whereas in the latter case the governmental act can only be declared invalid (see J.S.A. 5).

The court below, in a sweeping statement (*Id.*) devoid of either examination of precedent or analysis, purported to find a distinction between a wrongful transgression of the taking clause (*i.e.*, one that ". . . may exceed constitutional limits . . .") and something which it called ". . . lawful taking of property. . ." (*Id.*). As the preceding discussion shows, such a distinction is illusory. The "constitutional limits" are exceeded not because the regulation works a taking —"lawful" or otherwise—but because it works a taking without compensation. It is the lack of compensation that offends the Constitution, not the taking.

As this Court has repeatedly stressed, the subjective "intention" of the taking entity is of no moment; in the words of Mr. Justice Stewart: ". . . The Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*" (*Hughes v. Washington,* 389 U.S. 290, 298 (1967) emphasis in the original). Accord, *Davis v. Newton Coal Co.*, 267 U.S. 292, 301 (1925): "The incantation pronounced at the time is not of controlling importance; our primary concern is with the accomplishment."

The full dimension of that error below is readily demonstrated. To begin with, the short answer is that this Court's authoritative analysis in *Kaiser Aetna v.*

United States, ... U.S. .... [100 S.Ct. 383] (1979) is to the contrary. There the Court first inquired as to whether a regulatory power existed, and whether it was properly exercised by the Congress. Having then concluded that the answer was affirmative, the Court went on to make the further inquiry whether the *proper* exercise of this *proper* power nonetheless worked a taking by reason of its impact on the regulated property (see 100 S.Ct. at 390-393). Accord, *Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974). This is precisely the rationale of the California case of *Eldridge v. City of Palo Alto,* 57 Cal.App.3d 613, 129 Cal.Rptr. 575 (1976) which the court below erroneously overruled in the case at bench. (see J.S.A. 6). In other words, the fact that a regulation works a taking does not make it any less "lawful".

Second, the error of the court below lies in its none-too-tacit premise that it is the function of the judiciary to rescue the legislative branch of the government from the natural consequences of its own unwillingness to confront and assess the probable constitutional and economic effects of its intentional and deliberately arrived at decisions. The fallacy embraced by the court below seems rooted in its uncritical acceptance of polemical commentaries (see J.S.A. 11-12) that evidence a complete misunderstanding of the nature of inverse condemnation, by asserting that just compensation should not be payable when the taking is accomplished inadvertently.[6] Such assertions miss the mark

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[6]One of those commentators' additional assertion that such judicial rescue operations are particularly appropriate in the case of measures adopted by initiative, scarcely warrants serious response. When the people exercise that power they engage

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because in most cases of inverse condemnation the taking is "inadvertent"; when the government takes property advertently, it files eminent domain proceedings, and volunteers just compensation—at least it is supposed to do so (42 U.S.C. §4651, Cal. Gov't. Code §7267.6). The business of the United States Court of Claims is in large measure composed of cases in which the government vigorously denies that any intended taking occurred; yet in many such cases, it learns that whether advertent or inadvertent, a taking requires payment of just compensation, not because it is convenient or conceded, but because the Constitution commands it. As one noted commentator observed, the constitutional guarantee is not limited only to those situations where the taking is cheap or easy but, on the contrary, the need to compensate is greatest where the loss is greatest. Stoebuck, *Condemnation of Rights the Condemnee Holds in Lands of Another*, 56 Iowa L.Rev. 293, 307 (1970).

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in the basic governing process of a democratic society (*James v. Valtierra*, 402 U.S. 137 (1971)). There is no question that they may exercise their power as to land uses (*City of East Lake v. Forest City Enterprises*, 426 U.S. 668 (1976)). With that as a premise, can it be that when the people go to the polls without any of the resources and safeguards of a legislature (such as committee studies and hearings, consultation of experts and legal counsel, etc.), fortified only with electioneering rhetoric, they somehow acquire a greater power to strip their fellows of their constitutionally protected rights, with less adequate redress available to the victims?!! Appellants suggest that such pseudo-populist rhetoric strikes at the heart of the concept of *ordered* liberty; "the people", no more than their elected representatives, have a valid claim to the illusory benefit of a "free lunch"; nor do they have any greater claim to disregard of constitutional limitations. "The people" are the ultimate repository of governmental power (*M'Culloch v. Maryland*, 4 Wheat. 316, 404-405 (1819)); it is *they* who bound themselves by the Constitution, and until such time as *they* choose to change it, no reason appears why it should not be respected.

In sum, when the government sets out to govern, it exercises an awesome power for which it is accountable. The Constitution and the noble policy it enshrines, permits no less—whether accomplished overtly or by indirection.[7]

3.

APPLICATION OF SETTLED CRITERIA OF INVERSE CONDEMNATION LAW TO THIS RECORD ESTABLISHES THAT A TAKING OF PROPERTY HAS BEEN ALLEGED, AND ACCORDINGLY, REVERSAL WITH REMAND FOR A TRIAL ON THE MERITS IS CALLED FOR.

The intellectual thread that unites the case law established by this Court, is its focus, not on the simplistic notion of physical "property" being "taken" by physical seizure,[8] but on the inquiry of whether property rights

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[7]Since cases of this type are so heavily fact-dependent, it cannot be overemphasized that here the City (aided by noted expert consultants) determined that it must acquire the subject property, filed eminent domain proceedings seeking to do so, and only when faced with having to pay for what it thus consciously chose to acquire, resorted to the indirection of the "regulatory" scheme in issue here. However, that the legislatively authorized taking was thus semantically disguised, does not make it any less a taking:

> "What cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result. . . . Constitutional provisions, whether operating by way of grant or limitation, are to be enforced according to their letter and spirit, and cannot be evaded by any legislation which, though not in terms trespassing on the letter, yet in substance and effect destroy the grant or limitation." *Macallen v. Massachusetts*, 279 U.S. 620, 629 (1929).

[8]It may be noted in passing that the assessment of the physical "takings" notion by legal commentators has been withering: "anachronistic" and "outmoded", Van Alstyne, *Taking and Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 So. Cal. L. Rev. 1, 2, fn. 5; "primordial", Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 Dickinson L. Rev. at 210; "primitive",

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have been destroyed by governmental acts said to work the "taking". The classic case of *Pumpelly v. Green Bay Canal Co.*, 13 Wall. 166 (1872), makes the point well. Even though the instrument of the taking in that controversy was physical (*i.e.*, flooding), the Court did not rest its decision on that fact, but analyzed the controversy in terms of deprivation of the owner's right of user. The *Pumpelly* analysis found further expression in a series of subsequent cases that involved takings in the absence of physical intrusion or, in the face of such intrusion, focused nonetheless on the impact on the affected property rights: *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914) (intense air pollution so deprived land owner of use and enjoyment of his property as to work a taking); *Portsmouth Harbor etc. Co. v. United States, supra,* 260 U.S. 327 (claim of subordination of private land to governmental gunnery activities on a nearby parcel stated a cause of action in inverse condemnation); *United States v. Causby,* 328 U.S. 256 (1946) (flight of governmental aircraft so interfered with use of the affected land surface as to work the taking of an easement).

Of particular significance are cases in which (as at bench) the taking was effected by legislative acts:

Beuscher, *Notes on the Integration of Police Power and Eminent Domain by the Courts: Inverse Condemnation,* in J. Beuscher and R. Wright, Land Use, 728 (1969); "antideluvian" and "troglodytic", Berger, *To Regulate or Not to Regulate?—Is That The Question?,* 8 Loyola L.A. L. Rev. 253, 258-259 (1975). These harsh judgments seem amply justified; we have come quite a way from livery of seisin, and no sound reason supports its reincarnation in this field. Of course, as this Court noted in *Penn Central,* the presence of a physical invasion results in a more ready judicial finding of a taking (438 U.S. at 124), but that is not a requirement (438 U.S. at 122, fn. 25).

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (prohibition of coal extraction deemed its taking); *Lynch v. U.S.,* 292 U.S. 571, 579 (1934) (legislative abrogation of contractual rights constitutes a taking); *U.S. Trust v. New Jersey,* 431 U.S. 1, 29, fn. 27 (1977) (legislative abrogation of bond indenture provisions constitutes a taking of bondholders' rights).

Yet another type of situation arose in *Armstrong v. United States,* 364 U.S. 49 (1960) where a governmental act of contractually possessing unfinished ship hulls worked an effective extinguishment of intangible rights (*i.e.*, materialmen's liens), and this too was deemed a taking.

What emerges from this Court's analysis is the twofold principle that (a) a "taking" consists of the deprivation of the former owner of his property rights (*United States v. General Motors, Inc.,* 323 U.S. 373, 378 (1945), and (b) in making a determination of whether such deprivation has occurred, one needs to consider several factors of "particular significance" (*Penn Central,* 438 U.S. at 124). Based on this Court's distillation of these factors in *Penn Central* and in *Kaiser Aetna v. United States, supra,* 100 S. Ct. at 390 *et seq.*, it appears that the following criteria of a taking are present here:

(a) *Economic impact on the owner* (438 U.S. at 124). The allegations at bench are that the large-lot zoning involved here,[9] has deprived the subject property of all utility and value. This is clearly in the nature of a

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[9]See *Appeal of Kit-Mar Builders,* 268 A.2d 765 (1970, Pa.); *Sanfilipo v. County of Santa Cruz,* 415 F.Supp. 1340 (1976, N.D. Cal.); *Arastra Limited Partnership v. City of Palo Alto,* 401 F.Supp. 962 (1975, N.D. Cal.), opinion vacated by stipulation following settlement, 417 F.Supp. 1125.

compensable taking since no criminal or anti-social activity is sought to be suppressed here.[10] In other words, where the activity proscribed by the regulation is criminal or has been determined to be a threat to public health or safety, property used in its pursuit may be outlawed or even confiscated and physically destroyed, without compensation; this is the so-called "noxious use" theory which is based on the premise that there is no property right in maintaining a nuisance or in engaging in a criminal activity (*e.g., Mugler v. Kansas,* 123 U.S. 623 (1887)). But when the use of private property does not involve such overtly anti-social activities, the regulation must be reasonable. *Nectow v. Cambridge,* 277 U.S. 183 (1928). The point is well made in *Kaiser Aetna v. United States, supra*; there the Court found that the government did have regulatory authority over the Hawaii Kai Marina, but could not exercise it so as to deprive the owner of a property right. On the other hand, suppose that the marina had been a threat to navigation; is there any question that the government could then take whatever steps were necessary to abate the hazard, even if it meant shutting down the marina? See *Pennsylvania v. The Wheeling etc. Bridge Co.,* 13 How. 518 (1851). Directly on point is *Pennsyl-*

[10]Compare *Mugler v. Kansas,* 123 U.S. 623 (1887) (prohibition statutes' destruction of value of a brewery upheld on the grounds of legislative interdiction of a grave social evil); *Hadacheck v. Sebastian,* 239 U.S. 394 (1915), and *Reinman v. Little Rock,* 237 U.S. 171 (1915) (banning of nuisance-like activities in densely populated areas upheld).

vania Coal Co. v. Mahon, supra, 260 U.S. 393, and particularly its discussion at 415-416, concluding that where the economic burden of regulation falls onerously on the regulated owner, a taking results under the principle of social cost distribution (accord, *Armstrong v. United States, supra,* 364 U.S. at 49).

(b) *The owner's reasonable expectations* (438 U.S. at 124-125, and 100 S. Ct. at 390). There is nothing here to suggest that the owners' expectations were anything but reasonable; no collision with any paramount proprietary rights of the government are involved here (*cf. Penn Central,* 438 U.S. at 125). Appellants bought residentially zoned land in a residential area (that remains such even now). No incompatibility of land uses is involved (compare *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926)).

(c) *A state tribunal's reasonable conclusion that police power objective of health, safety and morals would be promoted by prohibiting particular contemplated use of land* (438 U.S. at 125).

This point is clearly in Appellants' favor; there is no "reasonable conclusion" by a state tribunal on this record. Indeed, Appellants were not afforded their day in court before such a tribunal, and that fact alone calls for reversal. Moreover, if the Constitution and this Court's precedents are to be accorded any weight, it cannot be "reasonable" for any lower tribunal to say that ostensible "regula-

tion" that deprives the regulated property of *all* use and value passes constitutional muster (see authorities collected in *Penn Central,* 438 U.S. at 127-128).

(d) *Governmental actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions* (438 U.S. at 128).

This element is manifestly present here and strongly favors Appellants' cause. The California Legislature was explicit in its findings of a public purpose inherent in the creation of open space resources (Cal. Gov't. Code §§6952, 6953, 65561, and 51097). Not content with these declarations of policy, the Legislature also spelled out its avowed intent to facilitate the acquisition of such public resources "*by purchase*, gift, grant, bequest, devise, lease *or otherwise*"[11] (Cal. Gov't. Code §6950 and §51097, emphasis added), and went on to authorize the expenditure of public funds for such acquisitions (Cal. Gov't. Code §6953). Finally, to leave absolutely no doubt as to its intent, the Legislature provided that its enactments are not to be construed as permitting the accomplishment of these public resource acquisition goals by adoption of ordinances in a manner that take *or dam-*

[11]Please note that such legislative language is deemed an authorization to acquire by means of steps taken by officials of the taking entity prior to formal vesting of title by expropriation. *Drakes Bay Land Co. v. United States,* 424 F.2d 574, 584 (1970, Ct. Cl.).

age[11a] private property for public use without the payment of just compensation (Cal. Gov't. Code §65912).

In short, what is involved here is an authorized *acquisition* of a public resource of a park-like nature (see Cal. Gov't. Code §6954, defining "open space" in language that can leave no doubt on this score); this is not "regulation".

Prolongation of the above analysis and detailed dissection of language contained in the various cases seems unnecessary. This Court's analysis in *Penn Central* speaks for itself.

In the case at bench, however, there are present certain additional factors of a factual nature that were not present in the cases heretofore decided by this Court. Harking back to the element of governmental "actions that may be characterized as acquisitions of resources" (438 U.S. at 128), it appears that (insofar as Appellants' knowledge and research indicate) the case at bench presents this Court with the plainest (if not most egregious) record of governmental acquisitory purpose pursued in the guise of regulation, ever considered on the merits. This record is simply overwhelming.

To begin with, Appellee did not act hastily or casually; rather, as far back as 1972, Appellee engaged the services of renowned consultants (Dean Witter & Co., Inc.) to prepare a financing plan *for open*

[11a]California is one of the States whose Constitutions provide for just compensation for damaging as well as for taking of private property; see Cal. Const., Art. I, §19.

space acquisition. (J.A. 6) The plan was duly prepared; it recommended acquisition to be financed by a municipal bond issue, and identified the specific properties to be acquired, including the subject property. (J.A. 6) Not content with that, Appellee also hired another consulting firm (Williams & Mocine) and had it prepare its Open Space Plan. This plan likewise specifically included the subject property and designated it as "indispensable to and necessary for the open space program". (J.A. 7) It went on to recommend that this property be "forthwith purchased". (J.A. 7) The City then went on to adopt a formal resolution authorizing condemnation of the subject property and indeed filed eminent domain proceedings (J.A. 9-10) which were later abandoned. (J.A. 10-11) Yet, even as the condemnation proceedings were being readied and prosecuted, Appellee was drafting and formally adopting the instant ordinance purporting to "regulate" private uses of the subject property, thereby raising doubts as to the *bona fides* of its conduct.[12]

Appellants are not to be understood as suggesting that legitimate public planning of *possible* acquisition of land should lead to liability. Appellants' point is that planning is one thing, but implementation of the de-

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[12]The condemnation resolution was adopted on October 25 and 26, 1973 (J.A. 9); the eminent domain action was filed six weeks later, on December 4, 1973 (J.A. 10) and abandoned almost a year later, in November, 1974 (J.A. 10).

And yet, on June 28, 1973, Appellee adopted Ordinances 123 N.S. and 124 N.S. (J.A. 6) purporting to regulate uses of land which Appellee's consultants earmarked for acquisition "forthwith", and on which Appellee then went on to file a condemnation action. Surely, a reasonable mind would be amply justified in drawing the inference that the "regulation" of land which was about to be condemned was a device intended to stultify all reasonable use to facilitate the acquisition, directly or indirectly.

cision to acquire, that emerges from that planning is quite another. When the planning is done, when the decision to acquire is arrived at, when the funds with which to pay for the acquisition are appropriated, and the "indispensable" place of the subject property in the municipal scheme of land ownership is proclaimed *urbi et orbi* (with predictably disastrous private market sequelae), and when an actual condemnation action is filed, that isn't any "planning"—that is acquisition, plain and simple. Moreover, that ostensible regulation is used in the process of facilitating such acquisition, does not make it any less an acquisition. In short, on this record, there is ample room for the drawing of the factual inference that wholly aside from its confiscatory effect *per se,* the regulation in question was conceived as an aid to acquisition, which is an illegitimate exercise of the police power, as held by the vast majority of American jurisdictions, ever since the seminal decision of *Forster v. Scott,* 32 N.E. 976 (1893, N.Y.).

If the City's conduct is not overtly acquisitory (short of formal expropriation of title), then it would be difficult to conceive of one; see *Benenson v. United States,* 548 F.2d 939 (1977, Ct. Cl.). *Drakes Bay Land Co. v. United States,* 424 F.2d 574 (1970, Ct. Cl.). These facts permit, if not compel, the inference that having confronted the value of the land it had decided to acquire, Appellee chose to try the "shorter cut" (*Pennsylvania Coal Co. v. Mahon, supra,* 260 U.S. at 416). In so doing, Appellee has provided this Court with a vivid illustration of the concerns of Mr. Justice Holmes, when he observed that:

> "The protection of private property in the 5th Amendment presupposes that it is wanted for public use, but provides that it shall not be taken

for such use without compensation. A similar assumption is made in the decisions upon the 14th Amendment. . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States." *Pennsylvania Coal Co. v. Mahon, supra*, 260 U.S. at 415.

What Appellee was doing here, from beginning to end, was *acquiring*—not regulating—property. Having done what it did, and having in the process destroyed the utility and value of the subject property,[13] it should not now be heard to argue that it was merely "regulating" (of course, even on that unsound premise, Appellee's argument fails because of the "regulation's" total destruction of utility and value).

[13]As is no doubt judicially noticeable (and surely subject to proof on the merits) the kind of municipal maneuverings displayed here do not go without notice in the marketplace. Once the City repeatedly proclaims its commitment to retention of the subject property as "indispensable" open space, and this bit of news (together with the on-again, off-again condemnation) gets around the local market, what reasonable person would be expected to buy the subject property for anything remotely resembling its fair value, or at all? See Hagman and Misczynski, *Windfalls for Wipeouts*, at 222 *et seq.* (1978). For a graphic insight into what happens to the marketability and utility of private property earmarked for condemnation see *Madison Realty Co. v. City of Detroit*, 315 F.Supp. 367, 371 (1970, E.D. Mich.) and *Drakes Bay Land Co. v. U.S., supra*, 424 F.2d at 586. Similar economic calamities can befall the landowner in such cases, even though the contemplated condemnation is eventually abandoned; see *Washington Market Enterprises, Inc. v. City of Trenton*, 343 A. 2d 408 (1975, N.J.); *Jones v. People*, 22 Cal.3d 144, 148 Cal.Rptr. 640, 583 P.2d 165 (1978). "It is one thing to have the sword of condemnation resting available but unpointed in the governmental sheath. It is another to have it suspended like that of Damocles directly above one's property", *Halpert v. Udall*, 231 F.Supp. 574, 579 (1964, S.D. Fla.) (Choate, J., concurring), aff'd. per curiam, 379 U.S. 645.

In sum, adhering to the criteria of a non-physical taking compiled by this Court in *Penn Central* and *Kaiser Aetna*, Appellants' complaint alleges a taking and entitles them to a trial on the merits.

4.

SETTLED LAW AND SOUND POLICY MILITATE IN FAVOR OF ENDORSEMENT OF AVAILABILITY OF JUST COMPENSATION AS THE AGGRIEVED PROPERTY OWNER'S REMEDY.

A. This Court's Precedents Uniformly Support the Appropriateness of the Monetary "Just Compensation" Remedy in Taking Cases.

On the issue of remedies much confusion was engendered below by the observation that in *Pennsylvania Coal Co. v. Mahon, supra*, this Court did not award damages upon its findings of a taking (see J.S.A. 8). With the utmost respect to the Court below, the significance sought to be ascribed to such assertion does not withstand scrutiny. A clear conclusion emerges from a brief comparison of the contexts in which the early police power/taking cases reached this Court, with those cases in which the question of remedies for an uncompensated taking *was* presented. While this Court—faithful to its Article III (of the U.S. Constitution) function of deciding cases and controversies, rather than rendering advisory opinions (*cf. New York v. Illinois*, 274 U.S. 488 (1927))—concentrated on the question of whether a taking did or did not occur *when that was the sole issue tendered by the parties*, it also examined the question of remedies *when that was in issue*. Courts, after all, do not roam over the

political landscape in *sua sponte* pursuit of comprehensive remedial schemes transcending the cause of the parties before the bench; see *Adkins v. Children's Hospital*, 261 U.S. 525, 544 (1923).

A review of the decisional law speaks for itself. *Mugler v. Kansas, supra,* and *Hadacheck v. Sebastian,* 239 U.S. 394 (1915), both were presented in the context of *habeas corpus* proceedings; the regulated owners in those cases disregarded the regulations and each sought to defend the ensuing prosecution on the grounds that (for the constitutional reasons advanced by them) the criminal charge was improper. Likewise, in *Goldblatt v. Town of Hempstead,* 369 U.S. 590 (1962) the owner disregarded the regulation, except that there the regulating entity sought to enjoin his activities. Similarly, in *Kaiser Aetna v. United States, supra,* the government sued the owner, seeking declaratory and injunctive relief (see *United States v. Kaiser Aetna,* 584 F.2d 378, 380 (1978, 9th Cir.). In *Euclid v. Ambler Realty Co., supra,* and *Reinman v. Little Rock, supra,* the owners sought injunctions to restrain the enforcement of the regulations. In *Nectow v. Cambridge,* 277 U.S. 183 (1928); *Welch v. Swasey,* 214 U.S. 91 (1909); *Zahn v. Board of Public Works,* 274 U.S. 325 (1927) and *Gorieb v. Fox,* 274 U.S. 603 (1927) the regulated owners sought to mandate the issuance of building permits notwithstanding the existence of the challenged regulations. *Miller v. Schoene,* 276 U.S. 272 (1928), presented for review the correctness of a decision by a county court affirming a state entomologist's order to chop down the aggrieved owner's ornamental cedar trees. *Pennsylvania Coal Co. v. Mahon, supra,* deserves particular mention in light of its evident misapplication in the opinion below. *Pennsylvania Coal* involved litigation between two private parties (a land surface owner sued the mineral owner seeking to enjoin coal extraction under his land); the regulatory entity (*i.e.,* the State of Pennsylvania) was not even a party, and hence any award of damages against it would have been a jurisdictional impossibility.

In sum, in all these cases there was no claim to compensation, nor—insofar as can be ascertained—were there any pleadings before the Court giving rise to questions of inverse condemnation relief.

In all these cases the Court decided the issues before it, and refrained from indulging in improvident dicta concerning theoretical problems *not* before it. It was only in recent cases, that claims to just compensation began appearing.[14] In the two such cases to reach

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[14]The various reasons of law, logic, policy and practicality that favor the availability of just compensation as a remedy for takings, are discussed *infra.* One aspect of such matters, however, warrants mention here.

One thing veritably leaps out of the court reports in reviewing the above classic decisions: *in none of them* did the (sometimes gravely damaged) landowners seek damages; in the vein of sensible people, they sought to impose no burdens on the public purse, and only asked to be let alone to use their property free of what they conceived to be excessive regulation. Why then did this attitude decline in the 1970s? Surely, no epidemic of avarice suddenly erupted among members of America's land owning populace—at least no more so than it was always there. What happened is that mushrooming, onerous regulations, combined with growing judicial deference to the regulators (particularly in some regions, including California), have at long last begun to produce situations where anything but a monetary remedy is useless. But what was true throughout America's history is still true today: given any sort of reasonable choice, landowners would continue to opt in favor of using, enjoying and improving their land. If nothing else, those are far more satisfying and profitable endeavors than costly and uncertain litigation that at best leads to the often harshly restricted fair market value of their land, which would be the measure of their recovery

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this Court thus far (*Penn Central Transportation Co. v. City of New York, supra,* and *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* ..... U.S. ..... [59 L. Ed. 2d 401] (1979)) the availability of the just compensation remedy was not even questioned. Indeed, in *Lake Country Estates* this Court went out of its way to satisfy itself preliminarily that a cause of action had been stated (see 59 L. Ed. 2d at 408), and went on to give liberal interpretation to the remedial scope of 42 U.S.C. §1983 (*Id.* at 409).[15] Of particular significance in that decision is the discussion at 59 L. Ed. 2d at 409, including footnote 11 (containing the 9th Circuit's pleading analysis and its conclustion that a cause of action in inverse condemnation had been stated), at the end of which the Court assumed the adequacy of those allegations (*Id.* at 408) and went on to conclude: "In this case, we need not even reach the Bivens question to conclude that *there is* both *a cause of action* and federal jurisdiction." (*Id.*, emphasis added).

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in inverse condemnation cases and which would leave them uncompensated for a host of consequential losses, to say nothing of their loss of profits. In short, when landowners seek inverse condemnation damages, it is because they have been driven to this measure of last resort, *not* because they like the idea.

[15]While the court below decided the case at bench on the basis of the paramount authority of the Fifth Amendment (see J.S.A. 7), it follows that Appellants' cause also gives rise to a claim under §1983 which expressly creates liability ". . . in an action at law . . ." for deprivation of any rights, privileges, or immunities secured by the Constitution. That state courts are bound to enforce federal laws is no longer subject to debate (U.S. Const., Art. VI, cl. 2, *Testa v. Katt,* 330 U.S. 386 (1947)). Moreover, that property rights are within the scope of protection of §1983, likewise cannot be doubted in the wake of *Lake Country Estates, supra,* and *Lynch v. Household Finance Corp.,* 405 U.S. 538 (1972). See *Gordon v. City of Warren,* 579 F.2d 386 (1978, 6th Cir.).

With the preceding discussion as background, Appellants turn to review of those cases in which this Court *did* consider the issue of remedies. Here the case law is clear to the point of being overwhelming: Appellants' research discloses four such decisions directly on point.[16] *In every one,* this Court rejected arguments of parties seeking specific relief, and opted instead for inverse condemnation damages as the proper remedy of owners of taken property.

Both in terms of result and rationale, *Hurley v. Kincaid,* 285 U.S. 95 (1932), is well nigh dispositive. The Court's rejection of the owner's attempt to secure a nonmonetary remedy is both clear and logical. Of particular interest is the Court's reasoning that proceeds from the premise that the Act in issue there was valid[17] (285 U.S. at 103). Once that is established, the question becomes whether the owner's constitutional rights are protected when just compensation is provided, or whether the whole law must fall because of lack of compensation. Mr. Justice Brandeis' answer to that question in *Hurley* is difficult to quarrel with: the owner's grievance in such cases is *not* that the govern-

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[16]*Hurley v. Kincaid,* 285 U.S. 95 (1932); *Dugan v. Rank,* 372 U.S. 609 (1963); *Fresno v. California,* 372 U.S. 627 (1963); *Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974). Also, see *United States v. Gerlach Live Stock Co.,* 339 U.S. 725, 752-753 (1950) (taking effected by state police power measure gives rise to right to just compensation, even though invaded right not protectible by injunction).

[17]While in *Hurley* this was conceded (285 U.S. at 103) it is basic that validity of a law cannot be made dependent on a citizen's concession; the law derives its validity from legislative action that is compatible with the constitutional authority. Thus, in *Kaiser Aetna v. United States, supra,* the owner did not concede the law's validity, but in spite of vigorous argument, the Court found that the law was valid, even if its application at the hands of the U.S. Corps of Engineers would work a taking (100 S.Ct. at 390).

ment takes his land, but rather that the taking has not been accompanied by compensation. What then should the government do? Obviously, it should tender compensation or file an eminent domain action, to have it fixed by the court. It follows, therefore, that if that compensation is provided by the courts (whether at the government's or the owner's behest) the flaw in the governmental action is cured, and there is no illegality (see 285 U.S. at 104).

B. Court Decisions Favoring the "Just Compensation" Remedy Rest on Sound Reasons of Public Policy.

Nor did *Hurley* stop there; it went on to note:

> "Even where the remedy at law is less clear and adequate, where large public interests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental ends, a court of equity acts with caution and only upon clear showing that its intervention is necessary to prevent an irreparable injury." 285 U.S. at 104, fn. 3.

That observation, of course, puts its finger on the heart of pertinent policy considerations: it would be most improvident to structure a remedial rule that would require the courts *as a constitutional imperative* to strike down potentially vital governmental programs or regulatory schemes, merely because they impacted on an affected property owner so as to deprive him of a "stick" in his property rights "bundle." *The Regional Rail Reorganization Act Cases, supra,* provide an excellent example of the hazards inherent in Appellee's theory. Had such a theory been applied there (as indeed it was by the trial court, only to be rejected by this Court) the upshot would have been an instant

destruction by the stroke of a judicial pen of a comprehensive congressional scheme, that would have left the most densely populated regions of the country without an effective rail transportation system, with no less than eight major railroads in the throes of fragmented, individual bankruptcy proceedings and without a coherent system whereby to consolidate and make optimally useful all of their combined resources, still needed to maintain a national rail transportation system.

To be sure, the case at bench does not present the Court with nearly such grave prospects, but that is just the point; the relatively unimportant (and self-inflicted) travails of what in fact is a small village in California should not serve as a vehicle for structuring a *constitutional* rule that in future application would require the judicial destruction of major national regulatory schemes that some day may be vital to national survival.[18] As Mr. Chief Justice Marshall enduringly put it:

> "The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those

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[18]This is no hyperbole. Surely, it takes no claim of clairvoyant powers to visualize various governmental regulatory responses to the difficult problems of energy and inflation, for example, that in application may trench on constitutionally protected property rights. Should that occur, which would be better public policy—to require the benefited public to pay only for those private rights destroyed in the process of thus bettering the public condition, or to declare such programs invalid, with possibly calamitous consequences? As the Court of Claims astutely noted in *Drakes Bay Land Co. v. U.S., supra,* 424 F.2d at 587, where the "convergent pressures" of desired governmental objectives and governmental unwillingness to pay for what is needed, impact on the property owner caught in the middle, it is recourse to inverse condemnation that ". . . has saved the day in many another sticky situation".

> who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *M'Culloch v. Maryland,* 4 Wheat. 316, 415 (1819).

Moreover, Appellee's thesis, that would have the courts invalidate legislative enactments on an ongoing basis, as the primary remedy, ignores the socio-political gravity of judicial intervention in the workings of a tri-partite government. When the judiciary invalidates a legislative enactment it is a measure of last—not first—resort. The judicial power to invalidate is a historically rooted power of "strict necessity" (*Rescue Army v. Municipal Court,* 331 U.S. 549, 568 (1947); *Spector Motor Service v. McLaughlin,* 323 U.S. 101, 105 (1944)), and is to be invoked only when "unavoidable" (*Alma Motor Co. v. Timken-Detroit Axle Co.,* 329 U.S. 129, 136 (1946)). An astute analysis of the mischief to the working of government, destabilization of laws, and indeed adverse impact on the judiciary, that would likely flow from too ready an invocation of the constitutional invalidation power was made by Mr. Justice Rutledge in *Rescue Army v. Municipal Court, supra,* 331 U.S. at 571-572. It is a policy of which it was said: "Time and experience have given it sanction. They also have verified . . . that the choice was wisely made" (*Id.* at 572).

Appellee's theory seems preoccupied with short-range provincial concerns of a small town's local interests. Its adoption by the court below ignores the grave strain that judicial invalidation of legislation imposes on the social fabric. The holding below improvidently fashions a rule that would have the judiciary impose constraints on what the legislature may or may not enact, not in the historical context of major, earth-shaking policy decisions that have confronted the nation on occasion and thereby made occasional legitimate claims on this Court's extraordinary power to invoke the organic law's grand scheme of checks and balances, but in terms of routine, day-in, day-out, case by case adjudications of purely local (often political) decisions involving what in national policy terms are but insignificant patches of land. Appellee's approach would make this Court the Supreme Board of Zoing Appeals.

Finally, legislative approaches to solution of social problems are inherently more flexible and democratic, and judicial delimitations of the legislative power should be created rarely and cautiously. It is the legislatures that are called upon to provide immediate responses to social needs of the moment, and legislators are more readily responsive and accountable to the public will. This is as it should be in a democratically based society. To impose on such a system of governance a process of *ad hoc* judicial intervention of a ". . . largely negative character and [with] limited resources of enforcement" (*Rescue Army v. Municipal Court, supra,* 331 U.S. at 571), would be most improvident. It seems by far the better policy to let the local legislators legislate, and when their enactments disregard the "just compensation" clause, and work a taking, it is

singularly appropriate that they—as the branch of government responsible for the public purse, both in terms of revenues and expenditures—should be called upon to face up to the consequences of their own informed decision making, and to pay for that (and only for that) which their solemn action took from a private owner. See *U.S. Trust Co. v. New Jersey, supra,* 431 U.S. at 29, fn. 27. In the long run, that approach is certain to enhance the quality of legislative cost/benefit analyses, and to provide incentives to local governmental entities' clear recognition of the distinction between municipal necessities, social amenities, and outright luxuries.[19] This is a sound policy for rich and poor alike; yet it must be noted that such considerations are *a fortiori* pertinent here, when one recalls that Tiburon is without a doubt one of the most affluent communities in the state (if not the country); it is already blessed with ample environmental resources, and can undoubtedly well afford any reasonable amount of parklands or "open space" for its well-heeled inhabitants.

In sum, sound, time-tested reasons of public policy respectful of the doctrine of separation of powers, coun-

[19]Every municipality needs transportation, and every one owns automobiles for that reason. Yet no one has ever suggested that a municipality should have the power to exact Cadillacs from local car dealers when the municipal budget only allows for Fords. No reason appears why similar reasoning should not apply to a municipality's real property needs and desires; as Mr. Justice Holmes observed in *Pennsylvania Coal Co. v. Mahon, supra,* 260 U.S. at 415, where a community has been so shortsighted as to fail to acquire enough for its needs [as determined by it], no reason appears why the courts should step in and supply the desired additional increment of social benefit gratis, any more than they supply any other community resources. Accord, *Griggs v. Allegheny County,* 369 U.S. 84, 89-90 (1962), (a community that constructs a bridge or airport without adequate approaches is not entitled to acquire them gratis by a claim that it is "regulating").

sel against the judiciary's, too-ready constitutional intervention in peculiarly local, often political, land use decisions on an ongoing daily basis. Legislatures know best what their constituencies need and what they can and cannot afford, and no sound reason appears why the courts should be called upon to assume a paternalistic role in this peculiarly legislative area of fiscal decision making.

C. Where a Regulation Works a Taking, the Presence of the "Just Compensation" Remedy Allows the Regulating Entity a Variety of Flexible Responses by Which to Lessen the Impact of the Adverse Judgment, While Preserving Optimal Regulatory Alternatives.

Beyond the above considerations, there are additional sound policy reasons that favor just compensation as a remedy.[20] If the regulating entity effects a taking and confronts monetary liability, it has several ameliorating options available to it. It can, for example, in those situations where a full irreversible taking has not been affected, amend the regulation so as to avoid the continuing constitutional violation, while preserving its proper regulatory objectives to an optimal degree. See *U.S. Trust Co. v. New Jersey, supra,* 431 U.S. at 29-30. In such cases, this will reduce the liability

[20]Not the least of which is the wholesome deterrent effect on would-be egregious violators of constitutionally protected rights; see *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 407-408 (1971) (Harlan, J., concurring). Absent such deterrent, see the appalling do-nothing attitude of municipal officials defying a corrective court order, once it was established that monetary recompense would not be required for a shocking taking of private residential land through gross pollution of water: *Ortega Cabrera v. Municipality of Bayamon,* 562 F.2d 91 (1977, 1st Cir.).

to payment of compensation for a temporary or partial taking. Even assuming the worst possible scenario from the regulating entity's point of view (*i.e.,* those situations where the courts find the invasion of private property rights to be so egregious as to work a complete taking), the municipality does not lose money, but rather acquires a valuable asset[21] whose acquisition axiomatically betters the public condition. Moreover, if the municipality should decide that the asset thus acquired is indeed beyond its means (or, more accurately, beyond its *willingness* to acquire), it would have the further option of changing its mind and selling the land thus involuntarily acquired.[22] Indeed, Cal. Gov't. Code §6953 expressly authorizes such resales.

Such considerations would further provide proper incentives for municipal fine tuning of regulations so as to meet at once the equally desirable goals of accomplishment of basic regulatory objectives (albeit possibly not to the degree that may be desired by community environmentalist zealots; see Frieden, "The Environmental Protection Hustle" (1979, MIT Press), *passim*), while still affording a measure of protection

[21]In other words, for its money, the municipality acquires its equivalent in the form of land whose price is judicially determined as being its fair market value.

[22]This idea is hardly novel. It is now authorized in cases of so-called excess condemnation, whereby under some circumstances a public entity condemns more land than it will use for the public project (see Cal. Code Civ. Proc. §1240.430). Such excess acquisition may occur because the government desires it (see *United States ex rel. TVA v. Welch,* 327 U.S. 546 (1946), *People v. Superior Court,* 68 Cal.2d 206, 65 Cal.Rptr. 342, 436 P.2d 342 (1968), or because the owner does (see Cal. Gov't Code §7267.7, 42 U.S.C. §4651(9)). Either way, resale of land acquired by the government is hardly unusual; indeed, such resale is an essential feature of urban redevelopment programs; see *Berman v. Parker,* 348 U.S. 26 (1954).

to the rights of the regulated (see *U.S. Trust Co. v. New Jersey, supra,* 431 U.S. at 29-30). In contrast, the kind of rule sought by Appellee, that would allow an irresponsible governmental entity to have a go at confiscatory regulation, without fear of meaningful adverse consequences save only an occasional judicial word of disapproval which might momentarily hurt the municipality's pride but leave it free to "regulate" anew (see *infra,* fn. 27), would be a positive disincentive to responsible governmental conduct. It would also act as an undue constraint on governmental efforts to experiment with novel regulatory schemes.[23]

Finally, a finding of monetary liability, subject to such fiscally ameliorative measures would have the wholesome effect of removing the crushing burden of delay and uncertainty from the afflicted landowners (see *e.g.,* the travails of the landowner in *William Haas Co. v. San Francisco,* 605 F.2d at 1117-1119 (1979, 9th Cir.)), while allowing the regulating entity a rational basis on which to assess, discount and forecast its exposure, and thereby reach informed and decisive cost/benefit conclusions when it sets out to impose onerous property regulations in pursuit of its democratically established social benefit goals.

[23]Such an approach would penalize the responsible regulatory entity whose well meaning but improvidently far-reaching regulations would be stricken down, forcing it into a whole new legislative effort with all the political and social turmoil that the re-creation of a legislative consensus so often entails (particularly in matters involving far-reaching novel regulations), while leaving the social problem unsolved. But, at the same time, such an approach would favor the irresponsible entity whose purpose was not so much the pursuit of social objectives by legitimate means, as it was to frustrate the regulated segment of society. See *infra,* fn. 27.

D. In Today's Regulatory Climate, Particularly in California, Invalidation of Regulations Is Virtually Unobtainable, and When Obtainable It Only Confronts the Owner With Other, and Usually Changing Regulations.

Traditional just compensation is also the better remedy pragmatically because in *today's* regulatory climate it often is the only one that can provide a relief *in fact*. Unlike the practice of a few decades ago when an aggrieved landowner could simply go to court and obtain a prompt and clear-cut judicial declaration of his right to put his land to reasonable uses, today's layer cake of regulations often makes that impossible, as a practical matter. Indeed, no less a proponent of expanded regulatory powers than Fred Bosselman (co-author of "The Taking Issue") astutely pinpointed the problem by raising this question: "Can our system of land use and environmental regulation become so Byzantine as to deny due process of law to the participants through the sheer complexity of the system?"[24] This is no idle concern; consider for example the shocking plight of the landowner in *William C. Haas & Co. v. San Francisco, supra,* 605 F.2d at 1118-1119, who found himself in a regulatory nightmare that ebbed and flowed for almost a decade, its salient feature being that no sooner did the owner make an effort to comply with the prevailing regulatory scheme, when it was changed, so that by degrees he was left with $1,900,000

[24]Address by F. Bosselman, ALI-ABA Land Planning and Regulation of Development Course, March 18, 1976; quoted in Hagman and Misczynski, "Windfalls for Wipeouts", at p. 12.

of his $2,000,000 reasonably made investment destroyed.[25]

The situation has become particularly acute in California. While at one time, California courts did intervene to protect landowners from arbitrary land use regulations, recent years have seen a development of a callous, if not positively hostile, attitude toward property rights. The last reported California case invalidating a land use regulation on grounds that it was confiscatory, is *Hamer v. Town of Ross,* 59 Cal.2d 776, 31 Cal.Rptr. 335, 283 P.2d 375 (1963). That was an end of an era; by then other California decisions had already served as harbingers of the message that in the coming brave new world California courts would indeed countenance total destruction of property rights; see *McCarthy v. Manhattan Beach*, 41 Cal.2d 879, 264 P.2d 932 (1953) (subject property singled out as the only "beach recreational district" in town, with all uses, save lifeguard towers, fences and small signs, prohibited); *Consolidated Rock Products Co. v. City of Los Angeles*, 57 Cal.2d 515, 20 Cal.Rptr. 638, 370 P.2d 342 (1962) (under existing zoning, property

[25]Appellants mean to stick to their own case, and do not intend to debate here in detail the merits of the *Haas* substantive ruling which—they observe in passing—was plainly erroneous. While this Court, ever since *Nectow v. Cambridge, supra,* has consistently adhered to the concept that a regulatory destruction of a landowner's reasonable, investment-backed expectations is tantamount to a taking, the *Haas* court, with a stroke of its pen, nullified this Court's decisions, through the semantic expedient of re-labelling such destruction as "diminution in value", and then rubbed salt in Haas' wound by charging that his adherence to this Court's doctrine was an attempted "recharacterizing" of the "diminution in value" (605 F.2d at 1121).

rendered completely worthless but no relief granted). Before too long, the California land regulatory climate produced such appalling decisions as *Avco Community Developers, Inc. v. South Coastal Regional Commissions,* 17 Cal.3d 785, 132 Cal.Rptr. 386, 553 P.2d 546 (1976), cert den. 429 U.S. 1083 (land developer who in full compliance with local county regulations built storm drains, culverts, street improvements, utilities and other facilities for an entire tract, and in the process expended $2,082,070, and incurred liabilities of $740,468, was held not entitled to complete development—at a loss of over $7,000 per day—without a permit from a newly created Coastal Commission.)[26]

There followed cases such as *Helix Land Co. v. City of San Diego,* 82 Cal.App.3d 932, 147 Cal.Rptr. 683 (1978) (barren, saline desert land in the mouth of the Tijuana River zoned "agricultural"); *Friedman v. City of Fairfax,* 81 Cal.App.3d 667, 146 Cal.Rptr. 687 (1978) (private property zoned for public recreation, even though trial court found that such zoning locked landowner into unprofitable use); *Frisco Land & Mining Co.,* 74 Cal.App.3d 736, 141 Cal.Rptr 820 (1977) (a truly Kafkaesque saga of a landowner driven

[26]Lest the court think such permit a formality, the Commission (which promptly began leading a charmed life in California courts—see Berger, *You Can't Win Them All—Or Can You?,* 54 Cal. State Bar Jour. 16 (1979)), was held capable of simply denying such permits for years, on the flimsy ground that the land in question ". . . *may* ultimately be designated for public use in the coastal zone plan . . ." *State of California v. Superior Court (Veta),* 12 Cal.3d 237, 255, 115 Cal.Rptr. 497, 509, 524 P.2d 128 (1974), emphasis added. It warrants emphatic notice that today, in 1980, that "plan" is still not completed. Compare this Court's view that government may not constitutionally depress values and then acquire: *United States v. Reynolds,* 397 U.S. 14, 16 (1970).

into foreclosure by a bizarre proceeding that terminated with a *post facto* ruling that he should have sought his administrative "remedies" before a then nonexistent agency which, after it later came into being, disclaimed any jurisdiction to consider his cause). More cases of egregious disregard of property rights could be readily mustered, particularly involving the California Coastal Commissions which literally pride themselves on their capricious and callous treatment of property owners within their jurisdictions, but the point emerges with clarity from the cases cited.

In other words, what happened in California is that regulatory entities, encouraged by the state courts, realized that land use "law" is not necessarily a stable set of rules to live by, but a constantly shifting kaleidoscope of local biases and ideological predilections, whose victims are not afforded any relief for the simple reason that if the property owner wishing to use his land is undeterred by one set of "regulations", another one promptly makes its appearance. In a noteworthy confusion between ends and means, the public profession of noble environmental goals is offered as a substitute for constitutional protection of private property. Much of this problem is rooted in *Selby Realty Co. v. City of San Buenaventura,* 10 Cal.3d 110, 109 Cal.Rptr. 799, 514 P.2d 111 (1973), where the California Supreme Court held that "the law" against which to measure an owner's rights is not the law in existence when he applies for and is denied leave to proceed with using his land, but rather "the law" at any time the regulating municipality chooses to change it.[27]

[27]The abusive potential of this development may be seen from the observations of a California municipal lawyer (City Attorney for the City of Thousand Oaks), instructing his fellows:

(This footnote is continued on next page)

One could easily swell this brief to impermissible proportions discussing in detail the increasingly harsh trends in California land use decisional law. Suffice it to say that in the last few years things in California have reached such alarming proportions that it can be said categorically that a California landowner's attempts at obtaining remedies in state courts are a wholly idle endeavor. This, incidentally, accounts for the soaring numbers of inverse condemnation cases in the Federal Courts in California.[28]

It would be hard to find a better example of what awaits a California landowner in state courts than *Briggs*

"If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent Supreme Court case of *Selby v. City of San Buenaventura,* 10 C.3d 110, appears to allow the City to change the regulation in question, even after trial and judgment make it more reasonable, more restrictive, or whatever, and everybody starts over again." Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation),* 38B NIMLO Municipal Law Review 175, 192 (1975).

[28]See *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, supra; Rancho Palos Verdes Corp. v. City of Laguna Beach,* 547 F.2d 1092 (1976, 9th Cir.); *Newport Investments, Inc. v. City of Laguna Beach,* 564 F.2d 893 (1977, 9th Cir.); *Sederquist v. City of Tiburon,* 590 F.2d 278 (1978, 9th Cir.); *Isthmus Landowners Assn v. State of California,* 601 F.2d 1087 (1979, 9th Cir.); *Dahl v. City of Palo Alto,* 372 F.Supp. 647 (1974, N.D. Cal.); *Arastra Limited Partnership v. City of Palo Alto,* 401 F. Supp. 962 (1975, N.D. Cal.); *M. J. Brock & Son v. City of Davis,* 401 F.Supp. 354 (1975, N.D. Cal.); *Barbaccia v. County of Santa Clara,* 451 F.Supp. 260 (1978, N.D. Cal.); *Sanfilipo v. County of Santa Cruz,* 415 F.Supp. 1340 (1976, N.D. Cal.); *Kopetzke v. County of San Mateo,* 396 F.Supp. 1004 (1975, N.D. Cal.); *Trust of Three v. City of Emeryville,* 430 F.Supp. 833 (1977, N.D. Cal.); *Olinger v. City of Palm Springs,* 386 F.Supp. 1376 (1975, S.D. Cal.) vacated and remanded 538 F.2d 664 (1976, 9th Cir.). These, of course, are only the reported cases.

v. State of California, 98 Cal.App.3d 190, 159 Cal.Rptr. 390 (1979), the first reported California Court of Appeal case to apply the California Supreme Court's decision in the case at bench. In *Briggs,* the landowner was subjected to a two-pronged attack whereby one state body (the California Coastal Commission) denied her the permit necessary for improvement of her land, while another state agency (the Department of Parks and Recreation) moved at a glacial pace to condemn that land. The permit was denied after a furtive, *ex parte* communication between a Commissioner and the Parks Director. The Commission's denial of the permit took place in August, 1973. The owner was assured by state officials (including the Lieutenant Governor and Director of Parks and Recreation) that her land would be promptly condemned as soon as funds became available following a 1974 bond issue, and so, after exhausting her administrative remedies, she refrained from further efforts to improve it. In spite of issuance of the bonds, no such eminent domain action was filed until 1976,[29] but in the meantime, because of the permit denials and locally well-publicized and widely known governmental intent to condemn, the property lost *all* of its use and value, and no broker would even list it for sale. The trial court found on abundant and *undisputed* evidence that there was a *complete* loss of utility, value and saleability, so that by March, 1975, the

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[29]To rub salt in the wound, the state obtained a stay order from the California Court of Appeal, preventing the *Briggs* eminent domain proceedings from going to trial pending the disposition of the inverse condemnation action. Thus, the owner was simultaneously denied inverse condemnation relief as well as access to the courts to try the eminent domain case, thereby being denied any compensation *until the present time,* even though she was stripped of all attributes of ownership and value back in 1975. In the meantime she remains liable for property taxes.

property was *de facto* taken as no property rights remained in the owner. Since condemnation was planned, pursuit of non-monetary remedies would have been an act of utter futility, and the trial court so found. Just compensation was accordingly awarded. Nevertheless, the California Court of Appeal reversed, holding on the authority of *Agins* that the owner's *sole* remedy was a petition for a writ of mandate *to be brought within 60 days of permit denial, i.e., 1½ years before the de facto taking occurred!* As the *Briggs* opinion itself notes, such a writ action could not have succeeded; yet it was said to be the sole "remedy". In other words, California courts have applied *Agins* so as to require the owner in the *Briggs* case to perform the impossibility of receiving the remedy of invalidation 1½ years before the cause of action for the *de facto* taking accrued (compare *United States v. Dickinson*, 331 U.S. 745 (1947)).

Briggs, with its Catch-22 overtones, is not the only such California development; compare also *Toso v. City of Santa Barbara*, 151 Cal.Rptr. 912 (1979), (vacated by the California Supreme Court and summarily remanded for reconsideration in light of *Agins*), with the second opinion in that case: *Toso v. City of Santa Barbara*, ... Cal.App.3d ...., ... Cal.Rptr. .... (1980). What is astounding about such a comparison is the drastic reinterpretation of the facts in the second opinion under the impact of *Agins*, even though the evidence and trial court findings of fact were one and the same in both opinions. The second *Toso* decision makes invalidation well nigh unachievable, because it effectively forbids the landowner to prove that the "regulation" was not truly enacted in pursuit of legitimate police power objectives. See *infra*, fn. 31.

San Diego G. & E. Co. v. City of San Diego, 146 Cal.Rptr. 103 (1978), which is now pending before this Court as No. 79-678, provides another egregious example of the California courts' insensitivity to the Constitution's protection of property rights, that cries out for this Court's intervention. There the trial court found on clear evidence that the regulations in question completely destroyed the subject property's utility and value, and worked a taking. The California Court of Appeal affirmed (see 146 Cal.Rptr. at 112-113). Thus, when the California Supreme Court remanded that case to the Court of Appeal with directions to reconsider in light of *Agins*, one would have thought that the taking having been overwhelmingly established at both trial and appellate levels, it was only a matter of proper remedy (*i.e.*, since *Agins* forbade the awarding of just compensation, invalidation of the San Diego regulations would follow as a matter of course, the taking having been alleged, proved, found by the trial court and affirmed on appeal). However, in an inexplicable unpublished [second] opinion, the Court of Appeal failed to give any relief, and remanded the cause back for a bewildering and pointless retrial of the same facts (see Jurisdictional Statement in No. 79-678, Appendix G, p. G-4).

The point that emerges from the growing California case law is simply this: that State's decisional law particularly under the precedential authority of the California Supreme Court's decision in the case at bench, has now moved onto a tack whereby in regulatory taking cases it denies just compensation, but then also proclaims itself powerless to invalidate the regulations (on the theory that it is not for the judiciary to question legislative wisdom). That approach has now been ex-

tended so far that an aggrieved California landowner is stripped of even the basic due process right to show that the ostensible "regulation" has been enacted in bad faith—*i.e.*, that it is not promoting the police power objectives of public health, safety, welfare and morals, but rather serves impermissible governmental purposes. The second opinion in *Toso, supra*, unblushingly creates another rule of the Catch-22 variety: under this Court's criteria the aggrieved landowner may show that the regulation is not promotive of police power objectives (*Nectow v. Cambridge, supra*), but if he tries to do so in California he is told that he may not even inquire into the regulatory entity's constitutionally impermissible motivation. It follows that in their zeal to subordinate private property rights to the new ideology currently enjoying trendy acceptance in California governmental circles, the courts of that state have at long last formulated a rule that subordinates the mandate of the Constitution to the local law of remedies[30]—in direct contravention of this Court's holdings.[31] Note that California thus hews to its pre *Arlington Heights*, extremely narrow scope of constitutional review of land use ordinances (even in the context of exclusionary zoning; see *Assoc. Home Builders etc. v. City of Livermore*, 18 Cal.3d 582, 606, 135 Cal.Rptr. 41, 557 P.2d 437 (1976)). The

[30]What is a most revealingly remarkable feature of cases such as *Briggs, Toso II* and *San Diego G. & E.*, is that none of them either mention or acknowledge the existence or policy of the Constitution, and surbordinate the claims of *federal* constitutional violations before them to a bland discourse on state law of remedies.

[31]One inescapable attribute of California's new approach to judicial review of land use regulations is a sweeping invalida-

California landowner is said to have theoretical constitutional rights, but no available remedy to enforce them.

The blunt fact is that given the state of California's law of remedies in land use cases, a property owner in that state, seeking judicial relief for governmental invasion of his constitutionally protected property rights in the 1980's can expect about as sympathetic a judicial reception as a citizen seeking enforcement of his equal protection rights could expect from, say, the courts of Mississippi in the 1960's. Small wonder the workload of the federal courts in this area is growing. But however fierce any particular region's peculiar beliefs at any particular period in history may be, it is the Constitution—not local ideology—that is the supreme law of the land.

tion of the criteria this Court set out in *Arlington Heights v. Metro Housing Corp.*, 429 U.S. 252 (1977). Particularly note there Mr. Justice Powell's sensible observation that where the land use regulation is charged with an unconstitutional purpose, "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available" (429 U.S. at 266). As further noted there, sometimes a clear pattern of constitutionally impermissible conduct emerges, "[b]ut such cases are rare" (*Id.*), and most of the time ". . . the court must look to other evidence" (*Id.*). While these practical observations were made in the context of the Equal Protection Clause of the Fourteenth Amendment, no reason appears why one should ignore their good sense when dealing with violations of the Due Process clause of that very Amendment. As this Court so emphatically noted in *Lynch v. Household Finance Co.*, 405 U.S. 538, 552 (1972), the right to enjoy one's property without unlawful deprivation, is every bit as much protected by the Constitution as the other rights enumerated there: ". . . a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." (405 U.S. at 552).

The fact that in as populous, growing, litigious and highly regulated State as California, there have been *no* reported cases of invalidation on taking grounds in almost two decades speaks for itself. Appellee is urging the supposed "remedy" of invalidation because it can read the cases as well as Appellants, and it knows full well that in today's judicial climate in California invalidation is no remedy at all. In sum, the danger posed by California's current sweeping, insensitive disregard of constitutionally protected property rights is clear from its *de facto* denial of *both* monetary and non-monetary remedies, and nothing short of this Court's unequivocal corrective action will suffice to protect those rights. What is in issue is the integrity of those citizens' rights that the Constitution binds and weaves together into a Bill of Rights—a coherent, reliable doctrine whereby an individual can on principle say to his government: "This far, and no further!"[32] Or, as the court put it in *South Cutler Bay, Inc. v. Metropolitan Dade County,* 349 F.Supp. 1205, 1206-1207 (1972, S.D. Fla.):

> "The rights to life, liberty and property, as well as those to free speech, a free press, and freedom of worship and assembly, were established as fundamental legal principles by the Declaration of Independence and the Bill of Rights. No one of them is more important than any other, and

[32]In the words of Mr. Justice Stevens, in his concurrence in *Moore v. East Cleveland,* 431 U.S. 494, 513-514 (1977):

> "The holding in Euclid v. Ambler Realty Co. . . ., that a city could use its police power, not just to abate a specific use of property which proved offensive, but also to create and implement a comprehensive plan for the use of land in the community, vastly diminished the rights of individual property owners. It did not, however, totally extinguish those rights. On the contrary, that case expressly recognized that the broad zoning power must be exercised within constitutional limits."

> all must be cherished and protected as the foundation upon which our nation was conceived and built. To relegate any of these basic rights to a status inferior to that of another could only undermine the Constitution and lay waste to 200 years of increasingly secure democracy.
>
> "As each of these rights should be accorded equal status, so must all be applied equally to every economic and social group: to rich and poor, black and white, young and old, moderate and extremist, law-abiding and mischievous—in short, to all Americans."

The *pragmatic* fact is that today Californians are left with *no* remedies against governmental "regulatory" invasion of their property rights, unless this Court intervenes, and applies the remedy provided for in the Fifth Amendment for uncompensated takings (cf. *Chicago B. & Q. R. Co. v. Chicago,* 166 U.S. 226 (1897)).

CONCLUSION.

In the end, the idea expressed by the Court in *Lynch v. Household Finance Co., supra,* 405 U.S. at 552, says it all. Not only are property rights expressly protected by the Constitution, but a fundamental interdependence exists between them and the other rights protected by the Bill of Rights; "neither can have meaning without the other" (*Id.*). A government that has it within its unrestrained power to strip citizens of their lawfully accumulated property, of their material well-being on which rests the day-to-day security of their families, has little need for overtly invading their other seemingly protected rights. That is the teaching of logic and the verdict of history.

The Agins pray for a day in court and for a fair, due process chance to prove their allegations against a proper constitutional standard. They pray that the judgment below be reversed and the cause remanded for a trial on the merits.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 24 1980
MICHAEL RODAK, JR., CLERK

FOR ARGUMENT

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,
Appellants,

vs.

CITY OF TIBURON,
Appellee.

On Appeal From the Supreme Court of California

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In the Supreme Court

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OCTOBER TERM, 1979

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CITY OF TIBURON,
Appellee.

On Appeal From the Supreme Court of California

APPELLEE'S BRIEF

THE OPINION BELOW

The opinion of the Supreme Court of California is reported at 24 Cal. 3d 266, 157 Cal. Rptr. 372, 598 P.2d 25. It is set out in full in appendix A of the jurisdictional statement.

JURISDICTION

The jurisdictional facts are correctly stated by appellants in their statement of jurisdiction. Jurisdiction of this Court rests on 28 U.S.C. § 1257(2).

QUESTIONS PRESENTED

1. Is this case properly resolved on the present record where the facts as pleaded in the complaint, and the contents of the City's two relevant zoning ordinances, present the controversy and nothing further would be developed at trial since the issues raised are limited to the effect

of the ordinances as enacted because appellants have never applied to the City for any development approval whatsoever?

2. Has there been a "taking" where the City's zoning ordinances, as interpreted by the state court, allow residential development, which appellants allege was their primary purpose in acquiring the property, and where the ordinances do not interfere with any distinct investment-backed expectations, do not single out appellants for unfair treatment, and no action of the City has constituted a physical invasion of the property?

3. Has a "taking" occurred where the City's planning process considered options of regulation and acquisition of open space, and where the City's eminent domain action to acquire appellants' property was filed without undue delay and was abandoned according to the procedures specified by state law, and thereafter appellants' property was subject to the same zoning restrictions as numerous other properties within the City?

4. If an exercise of the police power should come into conflict with property rights protected by the Fifth and Fourteenth Amendments to the United States Constitution, would a judicial decree of invalidation constitute an appropriate remedy, or does the Constitution compel forced purchase?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Involved are the Fifth and Fourteenth Amendments to the United States Constitution (recited in appellants' brief at 2) and the City's open space zoning ordinances, which are Ordinance No. 123 N.S. (appendix D to the jurisdictional statement) and Ordinance No. 124 N.S. (appendix E to the jurisdictional statement).

STATEMENT OF THE CASE

The present appeal has been taken from the ruling of the California Supreme Court affirming the dismissal of appellants' complaint in inverse condemnation and for declaratory relief. (JSA, pp. 26-27).[1] Therefore, the facts before this Court are the appropriately pleaded facts of the complaint (not including its many conclusions of law) as well as two zoning ordinances adopted by the City of which judicial notice was taken by the California Supreme Court.[2]

According to the complaint, appellants own five acres of land in the City of Tiburon (Marin County) which they acquired for the purpose of residential development. Tiburon has an area of 1,676 acres, a population of approximately 6,000 (based upon the 1970 census) and because of its proximity to the City of San Francisco, its favorable climate, the sweeping views of the San Francisco Bay Area and other amenities, is a very desirable suburban residential area. (JA, pp. 3-4; JSA, p. 2).[3]

Tiburon, as well as every other city and county in California, is required to prepare a comprehensive general plan containing, *inter alia,* a land use element and open space element. (JS, p. 2; *see also* Cal. Gov't Code §§ 65302 and 65560 et seq.).[4] State law also requires that cities like

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[1]This is a reference to an appendix in the jurisdictional statement. Other references to the appendices of the jurisdictional statement will be made in the same manner. References to the joint appendix will be designated as JA, with appropriate page references.

[2]The complaint may be found in JA, pp. 3-13. The two City zoning ordinances are located at JSA, pp. 28-46.

[3]Some of the references are to the statement of facts found in the opinion of the California Supreme Court. Appellants' petition for rehearing before the state supreme court did not object to the court's factual statement, except to take issue with the court's reliance on the terms of the City's zoning ordinances. *See* appellants' petition for rehearing at p. 43.

[4]These mandatory state requirements regarding the contents of plan elements are quite detailed. For example, the land use ele-

Tiburon have open space zoning ordinances which are consistent with the adopted open space plan. Cal. Gov't Code § 65910.

The development of the required general plan in California entails a careful examination of numerous interrelated factors. Smaller cities would, under these circumstances, usually seek the advice of expert consultants whose recommendations would be considered when the city prepares its general plan. The City of Tiburon followed this approach by retaining two private consulting firms to prepare advisory reports. (JSA, p. 2).

In January of 1972 the City directed the firm of Williams and Mocine to prepare and deliver an open space plan. The report of that firm, issued in October of 1972, focused on possible land use designations and recommended that the City attempt to acquire a substantial portion of "Tiburon Ridge" for "open space". Appellants' property was identified in the report as one of the parcels involved. Also in January of 1972, the City retained Dean Witter & Company to prepare a written plan for open space acquisition financing. The Witter report, issued in July of 1972, recommended that the purchase of open space lands be financed by $1.25 million worth of general obligation bonds. (JA, pp. 5-6; JSA, pp. 2-3).

On January 28, 1973, the City adopted two ordinances which effected widespread zoning modifications in the City. These modifications drew upon but did not mirror the consultants' reports. (JSA, p. 3). Ordinance No. 123 N.S.

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ment must indicate the general distribution and location of land uses within the community and must also include a statement of the standards of population density and building intensity recommended for various districts. Cal. Gov't Code § 65302(a). The implications of the extensive requirements for an open space element as required by state law are discussed in this brief.

created and defined a "Residential Planned Development and Open Space Zone" ("RPD-1"). A key purpose of this zone was to permit reasonable use of open space land while also attempting to protect open space characteristics found within the zone. (JSA, p. 30). In this regard, the authorized uses of land under this zone were designated as 1) one-family dwellings, 2) open space uses, and 3) accessory buildings and accessory uses. The permissible density of buildings is designated to be not less than .2 nor more than one dwelling unit per gross acre. The ordinance contemplates the submission of a master plan which would be measured against the standards set forth in the ordinance. (JSA, pp. 28-36).

Ordinance No. 124 N.S. designated the particular parcels, including appellants' five acres, which would fall under the requirements of 123 N.S. (JS, pp. 3, 41-46). Appellants' property was designated in the "RPD-1" zone. (JSA, p. 3). Significant amounts of land other than appellants' property were also designated under this zone.[5] Appellants allege that Ordinance No. 124 N.S. forever prevented the development of the property for residential use or other use and completely destroyed the value of their property for any purpose or use whatsoever. (JS, pp. 5-7). However, the California Supreme Court concluded that as applied to appellants' five acres, " 'RPD-1' zoning means a maximum of five dwelling units or a minimum of one. Whether plaintiffs are permitted to build

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[5]While the text of the zoning ordinances are in the joint appendix, the map designated as exhibit A to Ordinance No. 124 N.S. is in the clerk's transcript and consists of two pages designated 21m (found following the text of the zoning ordinance). The two pages are actually one map and to be seen together should be placed side by side. The map illustrates the zoning districts created by the ordinance.

five dwelling units or fewer, will depend upon the particular architectural design contemplated and the results of the required environmental impact report." (JSA, p. 3).

In connection with the planning studies and Ordinance No. 124 N.S. appellants allege that the ordinance incorporated and adopted both plans in every respect. However, this allegation is completely contradicted by the terms of both of the City's zoning ordinances since neither makes any mention of the studies or of efforts to acquire the property. The Court of Appeal, which decided this case prior to its being heard by the California Supreme Court, stated: "Contrary to the allegations of the complaint, the ordinance does not incorporate by reference either of the 1972 reports on which it was based." *Agins v. City of Tiburon* (1978) 145 Cal. Rptr. 476, 478 n.2.

Appellants have never made application to use or improve their property following the City's adoption of Ordinance No. 124 N.S. nor have they either sought or received any definitive statement as to how many dwelling units they could build on their land. (JSA, p. 3).

On October 15, 1973, appellants filed a claim against the City in the amount of $2 million alleging that the adoption of Ordinance No. 124 N.S. had completely destroyed the value of their property. The City rejected the claim on November 12, 1973. (JS, pp. 7-8; JSA, pp. 3-4).

On October 26, 1973, the City passed a resolution directing acquisition by condemnation of appellants' property. (JS, p. 8). On December 4, 1973, the City filed a complaint in eminent domain to acquire appellants' property, but on November 1, 1974, the City filed a notice of abandonment of the proceedings as then authorized by Cal. Code Civ. Proc. § 1255a(a).[6] The trial court entered

[6]This section was repealed by Cal. Stats. 1975, ch. 1275, § 1.

a judgment of dismissal of the action on May 20, 1975, and in this connection the City paid appellants $4,500.00 for their necessary expenses incurred during the pendency of the action pursuant to Cal. Code Civ. Proc. § 1255a(c), which then fixed the rights of a condemnee upon abandonment of a condemnation proceeding. (JS, pp. 8-10; JSA, p. 4).

On June 16, 1975, appellants filed the instant action consisting of two causes of action, a claim in inverse condemnation and a request for declaratory relief. The claim in inverse condemnation sought $2,000,000.00 on the theory that the land was taken for a public use without the payment of just compensation. The cause of action in declaratory relief sought to have Ordinance No. 124 N.S. declared unconstitutional as applied to appellants' property. The City's general demurrer to the first cause of action was sustained without leave to amend while its demurrer to the second cause of action was sustained with ten days leave to amend (which appellants declined to do). (JSA, p. 25). The California Supreme Court affirmed the judgment of dismissal entered by the trial court and the present appeal has been taken from the ruling of the California high court.

SUMMARY OF ARGUMENT

1. Appellants have never applied to the City for permission to develop their property in any manner whatsoever. Yet, they allege that the effect of the City's zoning ordinances has been to destroy the value of their property. As long ago as *Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365, this Court allowed judicial review of the validity of an ordinance as enacted, but refused to review how such a zoning ordinance might be applied in a particular circumstance when local procedures had yet to be

invoked. In the instant case, the California Supreme Court took judicial notice of the zoning ordinances and construed them to require that as a matter of right appellants can develop a minimum of one residential unit and possibly five residential units on the five acres involved. This construction of the local ordinance is binding upon this Court. *Shuttlesworth v. City of Birmingham* (1965) 382 U.S. 87, 91.

In this context, the case can be resolved on the present record. To allow speculation at trial as to how the ordinance might be applied to the particular property, considering all of the variables involved, would cause the court to anticipate constitutional problems which might well be vitiated by the City's approval process and would cause the courts to become planning bodies since the trial would involve, of necessity, most of the same considerations that would be undertaken in the City's review process.

In short, the demurrer interposed by the City admits the allegations of the complaint for the purpose of determining whether the complaint states a claim. Together with the provisions of the zoning ordinances, the facts are spread before the Court and only legal issues are raised.

2. It is apparent that the City's zoning ordinances attempt to strike a balance between protection of certain environmental resources and the property owner's right to a reasonable use. In so doing, the City is carrying out the mandates of a state program. *See* Cal. Gov't Code §§ 65302 and 65560 et seq. Undoubtedly, a reasonable basis and legitimate governmental purpose support these ordinances. This was implicitly recognized by the California Supreme Court. There can be no question regarding the validity of these ordinances. *See, e.g., Mugler v. Kansas* (1887) 123 U.S. 623, 661.

Furthermore, the ordinances do not constitute "takings". Governmental authority to regulate is subject only to the dictates of "justice and fairness." *Andrus v. Allard* (1979) ..... U.S. ....., 100 S. Ct. 318, 327. Specifically, the ordinances satisfy the various tests which have been developed for resolving this issue. The ordinances allow residential use, the primary expectation of appellants in purchasing the property. They do not interfere with any investment-backed expectations as the mere purchase and ownership of vacant land does not insulate the owner from future regulation in perpetuity. *Compare Andrus v. Allard, supra, with Kaiser Aetna v. United States* (1979) ..... U.S. ....., 100 S. Ct. 383. The ordinances do not single out appellants' property as they apply to numerous other properties within the City; reciprocity of benefits and burdens is distributed among properties affected by the ordinances; no physical invasion or servitude has been created, especially by the mere enactment of the ordinances which in and of themselves impose no direct restrictions on the property. *See generally Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104. In this latter regard, the ordinances do not sanction or allow public use of the property and the "right to exclude others" has not been affected. *See Kaiser Aetna v. United States, supra,* at 393.

3. Nor has there been any abuse of the planning or eminent domain power by the City. In a timely manner the City received planning reports, adopted zoning ordinances, filed an eminent domain action to acquire appellants' property, and thereafter abandoned the action according to state law. From that point on no further effort is alleged to have been made by the City to reinstitute eminent domain proceedings. The sole operative factor controlling appellants' use of their property are the zoning ordinances.

The federal courts have implied "takings" only where it is clear that governmental authority has egregiously abused its condemnation powers. *Donohoe Const. Co. v. Montgomery Cty. Council* (4th Cir. 1977) 567 F.2d 603, 609. Such is not the case here. This is especially true where condemnation efforts have been terminated. In fact, it is difficult to know how the City could have proceeded to develop an open space program, other than as it did. Appellants' efforts to characterize the activities which were undertaken as abusive do not withstand scrutiny. If the City were not able to proceed in the open manner that appellee did, the kind of conspiratorial, backroom decision making which could lead to abuses would be encouraged.

4. When courts have been faced with regulations which if enforced would constitute "takings", they have invalidated those measures because they are unaccompanied by the just compensation which would be necessary to sustain them. *Penn Central Transp. Co. v. New York City, supra,* at 136. This approach reflects the proper accommodation between one of the least limitable powers of government (the "police power") and the rights accorded to private property. A remedy of forced purchase through the payment of just compensation would amount to government by purchase. *Andrus v. Allard, supra,* at 326.

The courts have invoked the remedy of compensation for "takings" where it is apparent that the legislative body contemplated that remedy. *See, e.g., Regional Rail Reorganization Act Cases* (1974) 419 U.S. 102. In the instant case, it is apparent from the immunities from liability enacted by the California Legislature that there was no legislative contemplation of damages. Cal. Gov't Code §§ 818.2, 818.4 and 821.2; *HFH, Ltd. v. Superior Court* (1975) 15 Cal. 3d 508, 519-20, *cert. den.* 425 U.S. 904.

Courts have also found compensable "takings" upon physical invasions of private property by governmental action. This result has obtained because of the perceived unfairness of singling out particular property and forcing it to bear a burden which should be spread across all of society. This approach also accords with the historic purpose of the fifth amendment, which was to protect property from expropriation. Entirely different considerations are at work when the effect of governmental regulation must be weighed against the Takings Clause. Physical invasion concepts have no applicability in the regulatory context. In this case, there was no physical invasion of appellants' property either by regulation or abusive use of the power of eminent domain.

ARGUMENT

I

THIS CASE IS PROPERLY RESOLVED ON THE PRESENT STATE OF THE RECORD SINCE THE APPELLANTS HAVE NOT SOUGHT APPROVAL FROM THE CITY AND THUS THEIR ATTACK IS LIMITED TO THE EFFECT OF THE ZONING ORDINANCES AS ENACTED.[7]

Appellants' complaint, distilled to its essence, alleges that the City's zoning ordinances which govern the use of appellants' property had the effect of precluding all use and destroying all value of that property. As long ago as 1926 this Court held that where it is alleged that a zoning ordinance of its own force constitutes a present invasion of the owner's property rights, an action may be maintained to challenge its validity. *Euclid v. Ambler Realty Co., supra,* at 386. In so holding, however, this Court de-

[7]The substantive validity of the ordinances, the conclusion that they do not constitute "takings", and the failure of the complaint to state a claim for abusive use of the eminent domain power will be established, *infra,* at II & III.

clined to speculate as to how the ordinance might be applied, relying in part on the Court's traditional policy of avoiding issues which are not ripe for resolution. The propriety of this policy was particularly noted with respect to the "powers of police" which were involved there and are involved here. *Euclid, supra,* at 395-97. Pursuant to this approach, followed by the California Supreme Court, the effect of the City's zoning ordinances as enacted is properly before the Court. How the ordinances might be applied, upon a proper application by appellants to the City, is not.

To deal with the issue raised by appellants' allegations that the zoning ordinances render their property useless, the California Supreme Court took judicial notice of the ordinances. That this is proper under California law is indicated from the opinion of the California Supreme Court itself. It is also proper under California law for a court to refuse to deem admitted a fact alleged in a complaint which is contradicted by facts subject to judicial notice. Again, this is evident from the opinion of the California Supreme Court in the instant case.[8] Also, in *Chavez v. Times Mirror Co.* (1921) 185 Cal. 20, it was stated: "There is apparently no dissent from the proposition that in the consideration of a pleading courts must read the same as if it contained a statement of all matters of which they are required to take judicial notice, even when the pleading contains an express allegation to the contrary." *Id.* at 23.

After having taken judicial notice of the ordinances, the California Supreme Court unequivocally construed them to allow appellants to build "between one and five

[8]The federal courts have taken judicial notice of facts on motions to dismiss. *Rank v. Krug* (1950) 90 F. Supp. 773. Federal courts have also refused to accept as admitted facts which are contradicted by facts subject to judicial notice. *Saxton v. McDonnell Douglas Aircraft Co.* (1977) 428 F. Supp. 1047, 1049 n.5.

residences on their property." (JSA, p. 13).[9] This construction, of course, is binding upon this Court. *Eastlake v. Forest City Enterprises, Inc.* (1976) 426 U.S. 668, 674; *Hortonville J. S. D. No. 1 v. Hortonville Ed.* (1976) 426 U.S. 482, 488; *Groppi v. Wisconsin* (1971) 400 U.S. 505, 507; *Shuttlesworth v. City of Birmingham, supra,* at 91 (state court construction of local ordinance); *Green v. Neal* (1832) 31 U.S. 188, 192-94.[10]

In sum, what is presented is the constitutional propriety of speculating as to how the allegedly offending City zoning ordinances might be applied to appellants' property. Since many possible results could flow depending on the contents of a master plan proposal submitted by the property owners, the physical circumstances of the property and other relevant criteria from the ordinance, it is simply impossible, and certainly inappropriate, to anticipate issues beyond the facial interrelationship of the zoning ordinances and the appellants' allegations.

This has been the policy of this Court, which has consistently recognized the utility of requiring available administrative processes to be invoked prior to judicial review.[11] This policy tends to support the broader policy

[9]It must be observed that the interpretation placed upon the ordinances by the state court avoids, rather than raises, constitutional questions by requiring that use be allowed.

[10]The irrelevance of the argument of amicus curiae Half Moon Bay Properties, Inc. that the California Supreme Court incorrectly construed this ordinance is thus evident. *Id.* at 7-10. Moreover, as the state's high court recognized, Ordinance No. 123 N.S. indicates that allowable density shall be not less than .2 dwelling units per gross acre. Thus, on a five-acre parcel at least one dwelling unit would be allowed as of right.

[11]While the opinion of the California Supreme Court makes no mention of the doctrine of exhaustion of administrative remedies, it was obviously implicit in the Court's refusal to anticipate how the ordinance might be applied. Under California law failure to exhaust available administrative remedies leaves a court without jurisdiction. *Abelleira v. District Court of Appeal* (1941)

of reaching constitutional issues only by necessity. For example, in *Aircraft Diesel Corp. v. Hirsch* (1947) 331 U.S. 752, the Court stated: "The very purpose of providing either an exclusive or an initial and preliminary administrative determination is to secure the administrative judgment either, in the one case, in substitution for a judicial decision or, in the other, as foundation for or perchance to make unnecessary later judicial proceedings." *Id.* at 767. In *Allen v. Grand Cent. Aircraft Co.* (1954) 347 U.S. 535, this Court avoided a "taking" claim as premature until exhaustion of required administrative procedures. *Id.* at 553. Of course it is entirely possible that the City's action in applying the zoning ordinance "might leave no remnant of the constitutional question." *See California Comm'n v. United States* (1958) 355 U.S. 534, 539-40. Likewise in *Moore v. East Cleveland* (1976) 431 U.S. 494 the Chief Justice stated:

> It is unnecessary for me to reach the difficult constitutional issue this case presents. Appellant's deliberate refusal to use a plainly adequate administrative remedy provided by the City should foreclose her from pressing in this Court any constitutional objections to the City's zoning ordinance.

Id. at 521. In analogous circumstances this Court has refused to anticipate constitutional issues since it refused to assume that one denial was certain to mean that all use would be prohibited. *Penn Central Transp. Co. v. New York City, supra,* at 136-37.[12] *See Rescue Army v. Municipal Court* (1947) 331 U.S. 549, 568-75 (general discussion regarding the policy of strict necessity in disposing of constitutional issues).

17 Cal. 2d 280; *Morton v. Superior Court* (1970) 9 Cal. App. 3d 977, 981; *see also Air Quality Products v. State of California* (1979) 96 Cal. App. 3d 340, 352. The City's demurrer raised this defense. (JA, p. 25).

[12]Standing has been denied to parties seeking to attack a zoning ordinance as discriminatory based in part upon failure to utilize available administrative remedies. *Warth v. Seldin* (1975) 422 U.S. 490, 504.

Appellants' plea for a trial in this case flies in the face of the established constitutional doctrines just recited. If by the allegation that a particular zoning ordinance has destroyed the value or usefulness of property a trial may be provoked, the courts will quickly become planning bodies. This is evident from appellants' contention that economic or physical factors may contradict the reality of uses allowed by regulation. *See* appellants' brief at 10. The consideration of social, economic and environmental factors relating to the property is precisely the function contemplated by the review process in the City's zoning ordinances. In fact, it is usually the process which is contemplated by the planning review mechanisms of most land use regulations. A determination by the City approving a project could vitiate all of the constitutional issues which appellants now try to raise.[13]

Appellants cite three cases in support of their contention that a trial is required under federal law. Those cases do not support this proposition. In *Cuyahoga River Power Co. v. Akron* (1916) 240 U.S. 462 and *Mosher v. Phoenix* (1932) 287 U.S. 29, this Court held that upon allegations that property had been "taken" federal jurisdiction could be invoked. Nothing in those cases indicated that a trial was required to resolve the issues raised. *Portsmouth Harbor L. & H. Co. v. United States* (1922) 260 U.S. 327 involved the alleged firing of military guns over private lands. Quite obviously the physical effect of such activities,

[13]In fact, one of appellants' supporting amici recognizes the function of an administrative remedy in avoiding unnecessary constitutional questions and goes so far as to suggest that administrative remedies should be supplied and be exhausted as a prerequisite to suits in inverse condemnation for compensation. *See* brief of amicus curiae Half Moon Bay Properties, Inc. at 23-25.

possibly in the nature of a physical invasion, raises fact questions. There is simply no similarily between *Portsmouth* and the present circumstance which presents legal issues regarding the scope of constitutional inquiry a property owner may invoke upon the enactment of a zoning ordinance, the application of which has not been decided.[14]

II

THE CITY'S ZONING ORDINANCES ARE VALID UNDER CONSTITUTIONAL STANDARDS OF SUBSTANTIVE DUE PROCESS. FURTHERMORE, THEY SATISFY THE SEVERAL TESTS WHICH HAVE BEEN FORMULATED FOR DETERMINING THAT A REGULATION IS NOT A "TAKING".

A. The Constitutional Standard for Determining the Validity of a Legislative Act (Which Does Not Infringe on any Fundamental Right) Is Whether There Is a Reasonable Basis for the Act and It Has a Substantial Relationship to the Protection of the Public Health, Safety or Welfare. The Zoning Ordinances in Issue Plainly Satisfy that Test.

The substantive due process standard for determining the validity of a legislative act has long been established. *See, e.g., Mugler v. Kansas, supra,* at 661. The test which has been formulated has been stated several ways but the essence of the standard is that legislative enactments will be upheld unless they are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety or general welfare. *See, e.g., Euclid v. Ambler Realty Co., supra,* at 395; *Village of Belle Terre v. Boraas* (1974) 416 U.S. 1, 8. Such exercises of the police power are normally presumed to be constitutionally valid (*see, e.g., Bibb v. Navajo Freight Lines* (1959) 359 U.S. 520,

[14]The general inapplicability of so-called "physical invasion" cases to issues involving conflicts between the exercise of the police power and the Takings Clause is discussed *infra.*

529) and are accompanied by a presumption of reasonableness. *Salzburg v. Maryland* (1954) 346 U.S. 545, 553. Finally, an exercise of the police power will be upheld if any state of facts, either known or which could reasonably be assumed, would support the exercise. *See generally, Goldblatt v. Hempstead* (1962) 369 U.S. 590, 596. Another important factor which has contributed to conclusions by this Court upholding exercises of the police power is where a state tribunal has reasonably concluded that the "health, safety, morals or general welfare would be promoted by prohibiting particular contemplated uses of land." *Penn Central Transp. Co. v. New York City, supra,* at 125.

The ordinances in issue, sustained by the state court, recite the significance of regulating the use of land in order to protect open space.[15] The City's ordinances, standing alone, find support in a set of facts which the enacting Council could believe were sufficient to justify the ordinances. For example, the societal price of unplanned development in environmental degradation and cost of providing public services is well known. Moreover, it is apparent that the City's open space planning program and zoning ordinances are contemplated and mandated by the requirements of California state law. *See generally* Cal. Gov't Code §§ 65302(e), 65560 through 65568, and 65910 through 65912. Specifically, in regard to the finding of the City zoning ordinance just quoted, the California Legislature has found that:

> Discouraging premature and unnecessary conversion of open-space land to urban uses is a matter of public

[15]For example, Ordinance No. 123 N.S. finds:

> It is in the public interest to avoid unnecessary conversion of open space land to strictly urban uses, thereby protecting against the resultant adverse impacts, such as air, noise and water pollution, destruction of scenic beauty, disturbance of the ecology and environment, hazards related to geology, fire and flood, and other demonstrated consequences [of] urban sprawl. (JSA, p. 29).

> interest and will be of benefit to urban dwellers because it will discourage non-contiguous development patterns which unnecessarily increase the cost of community services to community residents.

Cal. Gov't Code § 65561(b).

That the Legislature contemplated that much of the open space planning and regulatory program would be carried out by land use regulations is evident from the requirements of Cal. Gov't Code § 65910 requiring an open space zoning ordinance and the provisions of Cal. Gov't Code § 65567 (requiring that building permits, subdivision maps and open space zoning ordinances be consistent with the local open space plan).

It is abundantly clear that the zoning ordinances satisfy traditional substantive due process tests.

B. Recent Decisions of this Court Have Set Forth the Tests Which Delineate Between Exercises of Governmental Regulatory Authority Which Are Not "Takings" and Those Which Would be "Takings" Unless Invalidated.

The much used term "police power" is "but another name for the power of government." 1 *Nichols on Eminent Domain*, § 1.42[7] at 1-153 (3d rev. ed. 1979). It is one of the most essential and least limitable powers of government. *Hadacheck v. Sebastian* (1915) 239 U.S. 394, 410. In *Andrus v. Allard, supra,* the relationship between the power to regulate and protections accorded to private property was capsulized as follows: "The Takings Clause, therefore, preserves governmental power to regulate, subject only to the dictates of 'justice and fairness'." *Id.* at 327.[16] The same

[16]In setting the conceptual framework for establishing that the City's actions do not constitute "takings", appellee will distinguish between the substantive "taking" question (which is argued here) and the appropriate judicial response to an action which, if enforced, could work a "taking" (argued *infra* at IV).

concept was expressed in *Penn Central Transp. Co. v. New York City, supra,* where it was stated that the rights accorded to private property are protected by basic notions of "justice and fairness". *Id.* at 124; *see also* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 Harv. L. Rev. 1165, 1171-72, 1226 (1967). It is within this constitutional context that the courts have devised tests for determining whether particular regulatory measures, enacted under the broad authority of governmental power, clash with rights accorded to private property under the Takings Clause. Appellee will show that under the tests formulated, its actions are plainly within the arena of the police power and not the territory of the Takings Clause.

We start with the "several factors that have particular significance." *Penn Central Transp. Co. v. New York City, supra,* at 124: "the economic impact of the regulation on the claimant and particularly, the extent to which the regulation has interfered with distinct investment-backed expectations . . . ." *Id.* at 124. This factor has received added gloss from two subsequent opinions of this Court. In *Kaiser Aetna v. United States, supra,* the United States Army Corps of Engineers raised no objection to the construction of a marina and related facilities in a pond which in its natural state was not a part of the navigable waters of the United States. In an opinion which placed major emphasis on the legitimate investment-backed expectations of Kaiser Aetna, the Court found that the government's assertion of a public right of navigability in the area, after the project had been built and was operating, would be a "taking". *Id.* at 392-93. In *Andrus v. Allard, supra,* the contention that a prohibition on commercial transactions in pre-existing avian artifacts under certain statutes violated fifth amendment property rights was rejected. Specifically, the Court did

not recognize any distinct investment-backed expectations such as to render the statutes a "taking":

> Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests." *Id.* at 327.

In the instant case the City's zoning ordinances apply to prospective development of the property. It is alleged that the property was purchased for residential use and the ordinances, as interpreted by the California Supreme Court, allow residential use.[17] Thus, the land use regulations applicable to appellants' property do not interfere with what is apparently their primary expectation, namely residential use. *See Penn Central Transp. Co. v. New York City, supra,* at 136; Michelman, *supra,* 80 Harv. L. Rev. 1165, 1233-34. In fact, appellants reasonable expectations are not much affected by the zoning ordinances since under the previous zoning five units were the most possible. *See* amici curiae brief of Conservation Foundation, etc. Moreover, the law recognizes that property owners have no vested right because of conditions once obtaining. *Hadacheck v. Sebastian, supra,* at 410. In contemporary circumstances this has been interpreted to mean that the property owner has no vested right until approvals have been received under applicable regulations and relied upon. *South Park Square Ltd. v. City of Jackson, Miss.* (5th Cir. 1977) 565 F.2d 338, 344; *Avco Community Developers, Inc. v. South Coastal Regional Commission* (1976) 17 Cal. 3d 785, *cert. den.* 429 U.S. 1083. A rule recognizing an investment-backed expectation based on the regulations in force when property is purchased

[17]*Penn Central* also teaches that "taking" issues are resolved by focusing on the uses allowed by the applicable regulation. *Id.* at 131. *See Sibson v. State* (N.H. 1975) 336 A.2d 239; *Just v. Marinette County* (Wisc. 1972) 201 N.W.2d 761.

would completely frustrate public bodies in applying current public policy at any point in time.

The leeway given to regulatory acts is illustrated in *Penn Central Transp. Co. v. New York City, supra,* where it was pointed out that taking challenges have also been rejected even where the challenged action prohibited a beneficial use to which individual parcels had previously been devoted. *Id.* at 125-27.

Applying these concepts, appellants have no distinct investment-backed expectations such as to cause the City's zoning ordinances to be a "taking". It is noteworthy that appellants make no effort to establish such investment-backed expectations. *See* particularly, appellants' brief at 23-25.[18]

Thus, appellants may use their property for residential development as is their wish. They have made no substantial investment based on governmental approvals or representations. In short, they are no different than any owners of undeveloped land subject to regulatory requirements.

[18]Appellants suggest that their proposed residential construction would not involve any anti-social activity and therefore such cases as *Mugler v. Kansas, supra*; *Hadacheck v. Sebastian, supra*; and *Reinman v. Little Rock* (1915) 237 U.S. 171, are not relevant since in each of those cases a "noxious use" was present. First of all, inappropriate development of the appellants' parcel could certainly have external effects on adjoining property and the City (such as erosion or drainage problems, for example). Secondly, this Court has expressly rejected the "noxious use" characterizations of such cases as *Hadacheck v. Sebastian, supra, Miller v. Schoene* (1928) 276 U.S. 272, and *Goldblatt v. Hempstead, supra.* Thus in *Penn Central Transp. Co. v. New York City, supra,* it was stated:

> These cases are better understood as resting not on any supposed "noxious" quality of the prohibited use but rather on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and applicable to all similarly situated property.

Id. at 133-34. This statement is equally applicable to the instant case.

A second significant factor, from *Penn Central Transp. Co. v. New York City, supra,* at 124, is action by government which amounts to a physical invasion of property. In applying the concept of fairness the courts have almost universally found such physical invasions to be takings. Michelman, *supra,* 80 Harv. L. Rev. 1165, 1184. The obvious and largely irreversible effect of such physical invasions is to single out affected owners to suffer a cost which in fairness should be spread across all of society (an undue burden). *See, e.g., Armstrong v. United States* (1960) 364 U.S. 40 (government's complete destruction of a materialman's lien in Navy boats held a compensable taking; note, compensation was the only possible remedy since the taking was complete, irreversible and otherwise the owner would suffer exclusively for the public benefit).

The treatment of physical invasion cases accords completely with the historic purpose and utilization of the Takings Clause. Thus, the source of the Takings Clause in English law derived from the fear of English nobles that the King would seize land for his own use. Protection from this fear was included in the Magna Carta. In colonial America compensation was generally provided for physical takings and not discussed with regard to the effect of regulations. It appears that the drafters of the Constitution and the Bill of Rights did no more than carry over the historic British concern regarding arbitrary seizure of land. *See generally,* Bossleman, Callies and Banta, *The Taking Issue* (Council on Environmental Quality, 1973) at 318-20. Regarding physical invasions as takings is proper and fair since government is usually acting for its own benefit in these circumstances to the owner's complete detriment. *See, e.g., Eyherabide v. United States* (Ct. Cl. 1965) 345 F.2d 565 (property surrounded on three sides by Navy gunnery range with many military projectiles landing on the property).

Situations involving governmental regulation are entirely different. In these circumstances government is acting to promote the general welfare through regulation by adjusting the various interests of society through the political process. *Penn Central Transp. Co. v. New York City, supra,* at 124. Usually, as in the present case, such regulations do not single out particular owners but rather affect all similarly situated people in the same manner. Further, such regulations usually provide reciprocal benefits. *See generally HFH, Ltd. v. Superior Court, supra,* at 520-21. To equate the City's ordinances with a "taking" for public use, as appellants would do, reflects a failure to realize that most all governmental regulations in some respect limit the free use of private property. If such can be characterized as a public use, by analogy to a physical invasion, the inherent power of government to regulate would be severely crippled.

But, appellants do equate the City's ordinances with a public use.[19] In so doing appellants rely greatly on provisions of the California Government Code allowing acquisition of interests in property for open space purposes. *See generally* Cal. Gov't Code §§ 6950 through 6954.

Their argument is fallacious. Initially, as previously discussed, Cal. Gov't Code §§ 65560 et seq., in combination with Cal. Gov't Code § 65302(e), mandates each and every city and county within the state to adopt an open space plan. Even a cursory review of those sections reveals that the Legislature intended much of this program to be accomplished by regulation of private use. *See, e.g.,* Cal. Gov't Code §§ 65567 and 65910. Authorizing local agencies to acquire interests in open space merely contemplates that public ownership of interests in some open space lands

[19]*See* appellants' brief, for example, at 11, 26-27; brief of amicus curiae San Diego Gas & Electric at 21; amicus curiae brief of Pacific Legal Foundation at 14.

can be part of an overall open space program. For example, public ownership of an open space parcel could well be more permanent than regulatory efforts such as the City's ordinances. Thus, acceptance of appellants' argument would mean that most open space plans and implementing zoning ordinances in the State of California would constitute "takings" because of the existence of Cal. Gov't Code §§ 6950 et seq. Even to state this proposition is to reveal its erroneous and radical nature. It would no doubt come as a complete surprise to the California Legislature to discover that its state mandated program for protecting open space via a combination of planning through regulation and acquisition, where appropriate, resulted in a "taking" of all open space lands in California! For example, agricultural lands, of which there are vast amounts in California, are generally considered a form of open space. *See* Cal. Gov't Code § 66650(b)(2). Yet, they yield economic return to their owners, are not open to the public and in many instances are included in local open space plans. To consider that they have been "taken" by the enactment of statutes authorizing acquisition is simply erroneous.

Equally unavailing is the effort to characterize the zoning ordinances as having created a servitude in the property. This Court observed in *Penn Central Transp. Co. v. New York City, supra,* that " '[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Id.* at 130-31. The *Penn Central* Court also rejected the characterization of a land use restriction as imposing a servitude. *Id.* at 130 n.27. There is no conceptual distinction between a zoning ordinance which regulates minimum and maximum densities, thereby making it likely that not every square inch of the land can be developed, and setback requirements. *See Gorieb v. Fox* (1926) 274 U.S. 603 (upholding building set-

back requirements without any provision for compensation).

Appellants' position, quite simply, is that the limitations enacted through the City's zoning ordinances operate to single them out to endure a financial hardship. Yet, numerous other properties are subject to the same regulations. Agreement with appellants' argument would not only invalidate the ordinances as to all the properties within the City, but would invalidate all similar open space plans and implementing zoning ordinances in California. This contention was rejected in *Penn Central Transp. Co. v. New York City, supra,* at 131.[20]

The dissent in *Penn Central* was of the view that the landmark restrictions there involved lacked the usual reciprocity which gives support to regulatory schemes. Such reciprocity is present in the instant case as significant amounts of land in the City are subject to the same zoning. Each of the affected owners benefits from the planning control which would be exercised by the City to ensure that development has minimum external effects on their property. Even appellants benefit from these provisions as they would apply to neighboring properties.[21]

In summary, the City's actions do not constitute takings when evaluated against the rules of constitutional law that have evolved to define "justice and fairness" as limitations on the power to regulate.

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[20]It should also be noted that the right to exclude others, observed to be an important property right in *Kaiser Aetna v. United States, supra,* is not in the least abridged by the City's zoning ordinances. There is no right granted to the public to cross over or use appellants' property.

[21]Finally, before a taking can be established, the public use must be permanent. *Wilfong v. United States* (Ct. Cl. 1973) 480 F.2d 1326. Zoning, by its nature, is not permanent and will change over time to meet current needs. *See Euclid v. Ambler Realty Co., supra,* at 387. The City's zoning ordinances, being an expression of current legislative will, are of course subject to change.

C. Appellants' Attack on California Case Law Is Unwarranted.

In a rather strong attack, appellants challenge the California case law dealing with land use issues. A thorough review of the cases discussed reveals that appellants' characterizations are quite inaccurate. For example, appellants insist that the last California case invalidating a land use regulation was some years ago. Apparently, they overlook a decision of the California Supreme Court which was handed down subsequent to the instant case. In *Furey v. City of Sacramento* (1979) 24 Cal.3d 862, *app. dism'd* ..... U.S. ....., 62 L.Ed.2d 403, the landowners alleged that they were precluded from making use of certain sewage facilities which the landowners had been taxed to support through assessments. The case arose on demurrer and the court held, *inter alia,* that if the allegations were proven the landowners would be entitled to declaratory relief or mandate precluding application of certain disputed land use regulations to their property. *Id.* at 877-78. The court thus has made it clear that where application of regulations would constitute a "taking," invalidation is a live remedy in California.[22]

An objective reading of the cases discussed by appellants reveals a sound line of authority. *Avco Community Developers, Inc. v. South Coastal Regional Commission, supra* (vested rights rejected vis-a-vis new regulation where developer lacked all necessary governmental approv-

[22]Appellants also consider *William C. Haas & Co. v. City and Co. of San Francisco* (9th Cir. 1979) 605 F.2d 1117, to have been incorrectly decided. In fact, however, the property owner there contended that the rezoning had such a deep effect on his property, as compared to the benefit to the general welfare, that a "taking" had occurred. The court held, following *Penn Central,* that diminution in property value alone is not a "taking" and that the issue is resolved properly by focusing on the uses which the regulations allow. Specifically, the court found no investment-backed expectations but rather "disappointed expectations". *Id.* at 1121.

als, including building permits); *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 125 ("It is the prevailing rule that a reviewing court will apply the law in existence at the time of its decision rather than at the time the permit was denied."); *Toso v. City of Santa Barbara* (1980) 101 Cal. App. 3d 934 (inverse condemnation denied where city refused to up-zone property and abandoned all efforts at acquisition); *Helix Land Co. v. City of San Diego* (1978) 82 Cal. App. 3d 932, 945 ("Helix attempts to recoup profits they might have made on anticipated up-zoning and benefit to their properties deriving from the original—but now abandoned . . . flood channel."); *Friedman v. City of Fairfax* (1978) 81 Cal. App. 3d 667 (property had long been used for recreational purposes and had a remaining value, under the applicable regulations, of $250,000.00 versus a non-regulation value of $1,250,000.00); *Frisco Land & Mining Co. v. State of California* (1977) 74 Cal. App. 3d 736 (a mixed vested rights permit matter before the California Coastal Commission where the owner withdrew a pending application which would have facilitated the project; the court ruled, under established principles, that the owner had thereby failed to exhaust available administrative remedies).[23]

Appellants suggest that the California courts are not following federal law with a resultant shift of actions by landowners to federal courts. The California Supreme Court, in the instant case, recognized that whether a regulation is excessive turns "on the individual facts of each

[23]Appellee will leave to amicus State of California a rebuttal of *Briggs v. State of California* (1979) 98 Cal. App. 3d 190. Further, appellee will not attempt to argue *San Diego G. & E. Co. v. City of San Diego,* U.S. Supreme Court No. 79-678 (as do appellant and amicus San Diego Gas & Electric Company) except to note that even the initial opinion of the Court of Appeal recited that the property owner never sought permission from the City. *See San Diego G. & E. Co., supra,* (1978) 146 Cal. Rptr. 103, 113.

case." (JSA, p. 13). This is the same approach followed by this Court in *Penn Central Transp. Co. v. New York City, supra.* Further, the substantive ruling of the California Supreme Court, drawing on the fact that uses are available for the subject property, is totally consistent with this Court's rulings, particularly in *Penn Central, supra.* The tests applied by the California courts to determine whether a "taking" has occured and, if so, what remedy should be granted do not vary from federal law. Thus, the statement that there will be a shift of these cases to federal courts is purely speculative.[24]

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[24]Contrary to appellants' suggestion, the California courts have acted to protect property owners and developers from overreaching by public agencies. For example, in recent years the California courts have struck down overly restrictive zoning ordinances (*Hoshour v. County of Contra Costa* (1962) 203 Cal. App. 2d 602); struck down onerous conditions placed upon permits issued by public agencies (*Bank of America v. State Water Resources Control Bd.* (1974) 42 Cal. App. 3d 198); upheld the granting of conditional use permits and other land use permits (*Jacobson v. County of Los Angeles* (1977) 69 Cal. App. 3d 374; *Natural Resources Defense Council, Inc. v. California Coastal Zone Conservation Com.* (1976) 57 Cal. App. 3d 76); upheld the granting of variances (*Zakessian v. City of Sausalito* (1972) 28 Cal. App. 3d 794; *Allen v. Humboldt County Bd. of Supervisors* (1966) 241 Cal. App. 2d 158); upheld the approval of local governments of subdivision maps (*Youngblood v. Board of Supervisors* (1978) 22 Cal. 3d 644; *McMillan v. American Gen. Fin. Corp.* (1976) 60 Cal. App. 3d 175); and upheld landowner claims of exemption from the permit controls of the California Coastal Commission (*Pardee Construction Co. v. California Coastal Com.* (1979) 95 Cal. App. 3d 471; *Sierra Club v. California Coastal Zone Conservation Com.* (1976) 58 Cal. App. 3d 149; *San Diego Regional Commission v. See the Sea, Limited* (1973) 9 Cal. 3d 888). This list is not exhaustive.

III

THERE HAS BEEN NO ABUSE OF THE EMINENT DOMAIN POWER BY THE CITY AND THERE IS NO CONTINUING INTENT TO ACQUIRE APPELLANTS' PROPERTY. THEREFORE, A "TAKING" CAN NOT BE FOUND BASED ON AN IMPROPER COURSE OF CONDUCT.

Appellants argue that the City had an acquisitory intent such that the Court should ignore the City's zoning ordinances as being merely a part of an acquisition scheme. This argument is utterly meritless.

Under the facts as alleged in the complaint the City sought and received plans from consulting firms for development of an open space program. The two plans were received in July and October of 1972. The zoning ordinances in issue were enacted in June of 1973 as part of the open space program. The City's effort to acquire the subject property by eminent domain was announced by the City through the adoption of a resolution in October of 1973. There is no indication in the complaint that the planning process was less than aboveboard and open. Yet, in approximately one year's time from having received the plans, and within less than six months' time of adopting the zoning ordinances, the City took action to acquire the property. There is certainly no undue delay or abusive conduct suggested by these facts.

Furthermore, the eminent domain action was subsequently abondoned according to the procedures prescribed by California law. Thereafter, there is no indication that the City intended to acquire the property by purchase. Appellants recognize as much. In their statement of the case, it is stated that the City had not altered its objective, but its method for keeping the property in open space and that since the abandonment of the eminent domain

proceeding, the City has relied upon its zoning ordinances. (appellants' brief, at 6). Thus, the acquisition effort by the City was concluded and over. The zoning ordinances could not operate as an oppressive device because no further efforts at acquisition are suggested. Moreover, the zoning ordinances, having widespread application in the City, merely subjected the subject property to the same regulation as is imposed on numerous other properties.

Appellants' real quarrel is the same one as appellees have previously addressed, namely their supposition that the zoning ordinances destroyed the value of the property.

Thus, *Benenson v. United States* (Ct. Cl. 1977) 548 F.2d 939 and *Drake's Bay Land Co. v. United States* (Ct. Cl. 1970) 424 F.2d 574 are inapplicable since in each of those cases efforts by the landowners to undertake development activity or alterations were frustrated in anticipation of acquisition. In the instant case, appellants have never sought to develop their property. Moreover, the City's planning process was open and public and actions were taken in a timely manner. As acknowledged by the California Supreme Court, if calling a bond election and urging passage to secure funds for a public purpose constituted a "taking", the public agency involved would be subject to suit whether or not the issue carried. The exercise of democracy cannot be so burdened. (JSA, p. 14). The receipt of reports, public discussion and consideration of possible acquisition, the adoption of zoning ordinances which apply to a significant portion of the City, and the filing and abandonment of acquisition proceedings according to law cannot constitute inverse condemnation.

The federal courts have refused to intervene in local condemnation proceedings "absent strong and convincing evidence that the government has egregiously abused its condemnation powers." *Donohoe Const. Co., Inc. v. Mont-*

gomery Cty. Council, supra. In *Donohoe* the court distinguished cases such as *Benenson, supra,* and *Drake's Bay Land Co., supra,* in that the pattern of governmental abuse present in those cases was absent in *Donohoe.* In this regard, the court stated:

> Certainly at the commencement of this suit just six months after the decision to acquire was made, it cannot be said that the County had been unreasonably dilatory in instituting condemnation proceedings. To conclude otherwise would, in our opinion, unreasonably burden the legitimate planning efforts of state and local governments.

Id. at 609. There was no unreasonable delay in the instant case and the reasoning of *Donohoe* applies squarely. Furthermore, in *South Park Square, Ltd. v. City of Jackson, Miss.* (5th Cir. 1977) 565 F.2d 338, the court stated:

> We would deny a municipality the breathing space needed for responsible decision-making in the vital realm of urban planning if we held that it could not wait ten months to determine what property is needed for major road construction. A city would be unduly hamstrung if its permit decisions subjected it to potential liability on the basis of financial arrangements independently made by property owners affected by those decisions.

Id. at 343. Where federal courts have intervened in instances of agencies abusing condemnation powers the circumstances have been egregious. *See Richmond Elks' Hall Ass'n v. Richmond Redevelopment Agency* (9th Cir. 1977) 561 F.2d 1327 (land designated for condemnation in 1966 and agency represented that property would be acquired in 1969; agency flooded property by street improvements, but by 1972 determined not to purchase the property).[25]

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[25]Appellants also argue that California has rejected monetary damages for regulatory "takings" in all instances. This is not the case. *See Peacock v. County of Sacramento* (1969) 271 Cal. App. 2d 845. *Peacock* was recently described and its vitality confirmed

IV

WHERE REGULATORY ACTIONS WOULD CONSTITUTE "TAKINGS" IF ENFORCED, THE COURTS HAVE CONSISTENTLY INVALIDATED THE OFFENDING MEASURES.

As discussed previously in section II, the City's zoning ordinances are a valid exercise of the police power which do not impinge on appellants' property rights. However, this case, as resolved by the California Supreme Court, involved an additional issue, namely, whether the remedy for regulatory actions which do infringe on property rights is invalidation of the offending measure, or, as appellants urge, money damages in inverse condemnation.

A. American Courts Have Utilized the Remedy of Invalidation for Land Use Regulations Which Would Otherwise Be "Takings".

In the "taking" area courts have faced the problem of the potential conflict between the inherent power of government to regulate (as expressed in the phrase "police power") and the constitutional guarantees accorded to private property through the Fifth and Fourteenth Amendments.[26] Neither power to regulate nor the protection accorded to property is absolute, especially where they come into conflict. In these circumstances the courts have determined that the appropriate balance between the two is generally to invalidate regulations which would otherwise be

by the California Supreme Court. *See HFH, Ltd. v. Superior Court, supra,* at 517 n. 14. Any suggestion that this rule of law was *sub silencio* over-ruled in the opinion of the California Supreme Court in the instant case is misplaced. The continued life of the rule was expressly recognized in *Toso v. City of Santa Barbara, supra,* at 951-53. *See also Klopping v. City of Whittier* (1972) 8 Cal. 3d 39.

[26]In instances involving the federal government, the conflict may arise as between separate provisions of the United States Constitution. *See Kaiser Aetna v. United States, supra* (clash between the Commerce Clause and the Fifth Amendment).

"takings". This approach strikes the proper balance between the needs of the public, as reflected in actions taken by its duly elected representatives, and the rights of private property owners. The remedy of forced purchase through inverse condemnation (or government by purchase—*see Andrus v. Allard, supra* at 326) does not. The legal theory supporting this conceptual framework is sound. A governmental act which would violate property rights is a legal nullity precisely because it is unaccompanied by an offer of just compensation that would be required to sustain it. *See, e.g., Penn Central Transp. Co. v. New York City, supra,* at 136.[27]

American courts have followed this approach. In *Fred F. French Investing Co., Inc. v. City of New York* (1976) 385 N.Y.S.2d 5, a property owner sought a declaration of unconstitutionality and damages in inverse condemnation allegedly arising from the rezoning of two private parks. Under the rezoning, the parks were to be made available to the public and the air space above (development rights) was to be usable elsewhere in the Manhattan area subject to approval by regulatory authorities and acceptance of the development rights by a qualified owner. The court held the zoning ordinances to be invalid but also held that

[27]This approach is borne out in the instant case. The California Legislature stated, in connection with the required open space zoning ordinance which the City adopted:

> The Legislature hereby finds and declares that this article is not intended, and shall not be construed, as authorizing the city or the county to exercise its power to adopt, amend or repeal an open-space zoning ordinance in a manner which will take or damage private property for public use without the payment of just compensation therefor.

Cal. Gov't Code § 65912. Contrary to appellants' assertions, the logical and common understanding of these words is that the Legislature simply did not authorize cities, including appellee, to adopt open space regulatory measures which would be "takings". Rather, if they have that effect, they would be ultra vires under state law and invalid under guarantees of the state and federal constitutions.

there had been no inverse condemnation and consequently no requirement that the City pay just compensation. In developing this conclusion the court stated:

> As noted above, when the State "takes", that is appropriates, private property for public use, just compensation must be paid. In contrast, when there is only regulation of the uses of private property, no compensation need be paid. Of course, and this is often the beginning of confusion, a purported "regulation" may impose so onerous a burden on the property regulated that it has, in effect, deprived the owner of the reasonable income productive or other private use of his property and thus has destroyed its economic value. In all but exceptional cases, nevertheless, such a regulation does not constitute a "taking", and is therefore not compensable, but amounts to a deprivation or frustration of property rights without due process of law and is therefore invalid.

Id. at 8. In elaborating upon the point, the *French* court quoted from Professor Costonis:

> "[T]he goal of [challenges to regulatory measures] in conventional land use disputes is to preclude application of the measure to the restricted parcel on the basis of constitutional infirmity. What is achieved, in short, is declaratory relief. The sole exception to this mild outcome occurs where the challenged measure is either intended to eventuate in actual public ownership of the land or has already caused government to encroach on the land with trespassory consequences that are largely irreversible."

Id. at 9. *See also Jensen v. City of New York* (1977) 42 N.Y.2d 1079. Courts of other states have followed the same approach. *DeMello v. Town of Plainville* (Conn. 1976) 368 A.2d 71; *Gold Run, Ltd. v. Board of County Planning Com'rs* (Colo. 1976) 554 P.2d 317; *Davis v. Pima County*

(Ariz. 1978) 590 P.2d 459, *cert. den.* (1979) 39 CCH 3178; *Eck v. City of Bismark* (N.D. 1979) 283 N.W.2d 193.[28]

This Court has never directly addressed the remedy question in the context of a land use regulation. As appellants now concede, *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393 does not stand for the proposition that just compensation is required when a regulatory act infringes on property rights.[29] However, to the extent that this Court considered this issue in *Penn Central Transp. Co. v. New York City, supra,* it is evident that the Court assumed that an improper exercise of the police power would be invalid precisely because of its failure to provide just compensation:

> Rejection of appellants' broad arguments is not, however, the end of our inquiry, for all we have thus far established is that the New York City law is not rendered invalid by its failure to provide "just compensation"....

Id. at 135-36. The opinion went on to note: "We now must consider whether the interference with appellants' property is of such a magnitude that 'there must be an exercise of eminent domain and compensation to sustain [it].' *Pennsylvania Coal Co. v. Mahon,* 260 U.S., at 413." *Id.* at 136. *See also Kaiser Aetna v. United States, supra,* (governmental assertion of right to public navigability

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[28]Innumerable cases follow this concept. Other examples include *Cardon Oil Co. v. Phoenix* (Ariz. 1979) 593 P.2d 656; *Trustees Under Wills, etc. v. Town of Westlake* (La. 1978) 357 So. 2d 1299; *Mailman Development Corp. v. City of Hollywood* (Fla. 1974) 286 So. 2d 614; *Gaebel v. Thornbury Township, Delaware County* (Pa. 1973) 303 A.2d 7; *State v. Johnson* (Me. 1970) 265 A.2d 711; *Scrutton v. County of Sacramento* (1969) 275 Cal. App. 2d 412.

[29]At pp. 32-33 of appellants' brief appellants accuse the California Supreme Court of misapplying *Pennsylvania Coal.* This is surely a curious statement since the California Supreme Court expressly recognized that *Pennsylvania Coal* did not "transmute the illegal governmental infringement into an exercise of eminent

enjoined since if allowed it would constitute a "taking"; however, remedy issue not directly addressed).[30]

Appellants argue that the power to invalidate is a measure of last resort. (Appellants' brief at 38). In reality, however, the cases cited by appellants reflect the traditional policy of this Court not to reach constitutional issues or to strike legislative enactments unless the issues are squarely presented. Thus in *Alma Motor Co. v. Timken-Detroit Axle Co.* (1946) 329 U.S. 129, the Court followed the usual rule that if two issues are raised, one of a non-constitutional nature and the other of a constitutional nature, and the decision can be made on non-constitutional grounds, then the Court will make that choice. *Id.* at 136. Likewise, in *Specter Motor Co. v. McLaughlin* (1944) 323 U.S. 101, this Court refused to reach constitutional issues arising under state law where the state law had not been definitively construed by state courts. Finally, in *Rescue Army v. Municipal Court, supra,* as previously noted, there is an extensive discussion regarding the policy of resolving constitutional issues only by strict necessity. *Id.* at 568-75. In none of these cases is an issue regarding choice of remedies presented. Appellants' point is not well taken.

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domain and the possibility of compensation was not even considered." (JSA, p. 9). Appellants read *Pennsylvania Coal* the same way.

[30]Appellants cite *Penn Central* and *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency* (1979) 99 S. Ct. 1171 for the proposition that "the just compensation remedy was not even questioned." (appellants' brief at 34). Appellants make no attempt whatsoever to justify this statement as regards the *Penn Central* opinion and, as pointed out above, the contrary proposition seems more appropriate. In *Lake Country Estates,* because of the posture of the case, the Court dealt with immunities available to the Tahoe Regional Planning Agency and its governing body members pursuant to the Civil Rights Act (42 U.S.C. § 1983). There is no discussion in the opinion regarding the appropriate remedy. In fact, on remand in one of the cases consolidated in *Lake Country Estates* the district court held that declaratory relief is the proper remedy. *Jacobson v. Tahoe Regional Planning Agency* (1979) 474 F. Supp. 901.

B. The Courts Have Ordered Damages Where Such Damages Have Been Contemplated or Intended by the Legislature. Otherwise the Courts Have Invalidated Confiscatory Regulations.

Appellants' money damages remedy would, if accepted, transfer a significant portion of the power of the purse from local and state legislatures to the judiciary, with concomitant damage to legislative independence and the budgetary process. It is certain that the judiciary must make the often difficult determination of whether a particular regulatory action is sufficiently oppressive that it violates a landowner's constitutional rights. That decision can involve close questions and subtle distinctions. As long as invalidation is the remedy, these difficulties are simply the acceptable price always associated with judicial line-drawing in a complex policy area. However, under appellants' theory of remedy, the price of stepping over the line, however slightly and however innocently, would be a forced purchase, unbudgeted and unplanned, and in the case of innovative regulation, impossible to anticipate. The courts have been sensitive to this concern and have awarded damages where they have been legislatively authorized.[31]

Thus, in *Regional Rail Reorganization Act Cases* (1974) 419 U.S. 102, the question was whether certain mandatory provisions of the acts there involved were "takings". It was stated: "There are clearly grave doubts whether the Rail Act would be constitutional if a Tucker Act remedy were not available as compensation for any unconstitutional erosion not compensated under the Act itself." *Id.*

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[31]Appellants acknowledge that control over funding is a political question for legislative action. (appellants' brief at 16-17, 40-41). Appellants would, however, reverse the normal rules by having the courts make determinations of fiscal policy rather than legislative bodies.

at 134. The entire premise of the opinion was that if the Tucker Act would be available to provide a monetary remedy for any deficiency in payment to the railroads, then the availability of that Act would remedy any constitutional infirmity which might otherwise exist because of no provision for compensation. The Court concluded that Congress had not intended to withdraw the Tucker Act grant of jurisdiction to the Court of Claims in suits arising under the Rail Act. It seems apparent that had the Court concluded that damages were not available, via Congressional consent, the offending provisions of the Rail Act would have been stricken.

Another example of this approach is in *U.S. Trust v. New Jersey* (1977) 431 U.S. 1. While the issues involved impairment of contract, it is significant that the repeal by New Jersey of a provision which the Court held impaired the rights of certain bondholders was declared unconstitutional and void. *Id.* at 32. The opinion noted that: "The State remains free to exercise their powers of eminent domain to abrogate such contractual rights, upon payment of just compensation." *Id.* at 29 n.27. Thus, the Court invalidated the offending measure and left to the legislative body the choice of whether to extinguish those rights by payment of compensation. Appellants' implication that *U.S. Trust* required the payment of compensation is erroneous (appellants' brief at 39-40). See also *United States v. Clarke* (March 18, 1980) .... U.S. .... (whether an action in inverse condemnation is the proper remedy for a "taking" of Indian land is a question of Congressional intent).

The lower federal courts have recognized that compensation may be appropriate where Congress intended that the government acquire an interest in property. For example, in *Drake's Bay Land Co. v. United States, supra,* the Court held that Congress intended for the United States to acquire

an inchoate interest in the property at the time legislation was enacted authorizing the Point Reyes National Seashore. P.L. 87-657. The failure of government officials to expeditiously acquire the property coupled with their acts blocking development were held to justify an award of compensation. *See also Benenson v. United States, supra.*

The zoning ordinances in issue are immunized from liability under California law. *See generally* Cal. Gov't Code §§ 818.2, 818.4 and 821.2. The California Supreme Court has consistently interpreted these provisions to indicate legislative intent to confer immunity from damages for the enactment of zoning and planning measures. *Selby Realty Co. v. City of San Buenaventura, supra,* at 127; *State v. Superior Court* (1974) 12 Cal. 3d 237, 245-47; *HFH, Ltd. v. Superior Court, supra,* at 519-20. These same decisions have rejected causes of action seeking just compensation for "takings". It would seem clear that the California decisions have been following legislative direction by rejecting claims for just compensation. That is, since the Legislature has immunized these acts, it clearly can not have intended that compensation be paid.

Recently this Court sustained the validity of analogous immunities enacted under California law, finding that they rationally further a policy that reasonable lawmakers may favor. *Martinez v. California* (1980) ..... U.S. ....., 40 CCH S. Ct. Bull. B427. The Court recognized that the stated purpose of the section at issue was to allow correctional personnel to make determinations of parole unfettered by fear of tort liability. *Id.* at B432 n.6. The same policy considerations apply to land use regulation.[32]

Thus, the courts have recognized that inhibiting essential governmental actions taken to promote the public welfare

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[32]The Florida Legislature has determined that property owners can be compensated under certain specified circumstances. See Laws of Florida, ch. 78-85.

by the risk of damages is generally unacceptable. If governmental entities exercise their police powers in a Russian roulette-like manner, such that where they have guessed wrong they would have inadvertently purchased interests in regulated parcels, meaningful and necessary regulation of land use would be substantially impaired with a predictable adverse effect on the general welfare. In *Sala v. County of Suffolk* (2d Cir. 1979) 604 F.2d 207, U.S. app. pndg., the court, citing and paraphrasing this Court's decision in *Scheuer v. Rhodes* (1974) 416 U.S. 232, stated:

> Although the detrimental effect that unforeseeable municipal liability may have on forceful decision making may be less direct than in the case of personal liability, it is clear that the threat of such liability may inhibit public officials from "mak[ing] decisions when they are needed or . . . act[ing] to implement decisions when they are made."

Id. at 211. Similarly, in *Charles v. Diamond* (1977) 392 N.Y.S.2d 594, the court observed that extending liability where there had been no de facto appropriation of private property would lead to limitless municipal liability. Specifically, the court stated:

> More important, the prospect of tort liability might impede equally desirable governmental regulation and legislation since municipal officers might fear subsequent judicial imposition of massive tort recoveries. Open-ended liability could inhibit the enactment of needed, but constitutionally borderline, legislation.

Id. at 604-05. The North Dakota court has expressed similar fears. In *Eck v. City of Bismark, supra,* it was stated:

> We agree that the potential consequences of an action for inverse condemnation militate against its availability to challenge the constitutionality of governmental regulation. If actions for inverse condemnation loom in the future, land-use planning might be stymied, the fiscal-budgetary process chaotic, and the financial burdens on the community staggering. Most important, authorization of such an action would enable North Dakota courts to sit as legislative bodies doling out the State and local fisc.

Id. at 200-01.[33] This Court has recognized in other contexts the effect that significant financial costs imposed by higher authority can have on normal governmental programs and legislative choices. *See National League of Cities v. Usery* (1975) 426 U.S. 833, 846-47.

Likewise, commentators have recognized the inhibiting effect that a compensation remedy would have:

> Clearly the threat to the governmental pocketbook will intimidate legislative bodies which are considering the imposition of land use regulatory measures. In those very areas where rapid population growth and sprawl have stretched governmental capacity to finance demanded public services, in these very areas the need for rigorous controls is apt to be greatest. Yet the threat of contingent and unplanned-for liability, through inverse condemnation, would especially in these places, deter legislators from enacting the kind of virile measures needed. Instead, financial caution would dictate milky-toast, completely safe and probably ineffective measures. Instead of walking to the brink of its constitutional powers, the legislative body would stay far inside the edge.

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[33]The recognition of the proper roles of the courts and legislative bodies in determining the appropriate social allocation of limited financial resources was acknowledged in *Kasser v. Dade County* (Fla. 1977) 344 So. 2d 928. There the property owner sought rezoning of his property for a higher use. That request was denied. The court rejected the owner's action claiming that the county had effectively taken the property without compensation and held that the owner had a sufficient remedy under local procedures to challenge the validity of the underlying zoning ordinance:

> Had review been sought in the stipulated fashion and the action by the Board found to be unreasonable and confiscatory, the County would then have had the option of rezoning the property or condemning it via its eminent domain authority.

Id. at 929.

Beuscher, *Some Tentative Notes on the Integration of Police Power and Eminent Domain by the Courts: So-Called Inverse or Reverse Condemnation,* Urb. L. Ann. 1-2 (1968). *See also* Hall, *Eldridge v. City of Palo Alto: Aberration or New Direction in Land Use Law?,* 28 Hastings L. J. 1569, 1597 (1977)[34]

Appellants reply that invalidation is an insignificant remedy.[35] This is not so. Appellants recognize as much

[34]The issue of so-called "interim damages" was not dealt with by the court below, is not raised as an issue in the jurisdictional statement or appellants' brief. The issue was squarely presented and resolved in *HFH, Ltd. v. Superior Court, supra,* in which the California Supreme Court rejected interim damages under a theory of inverse condemnation and this Court declined review. In any event, appellee believes, as concluded by the California Supreme Court, that such damages would lie only if authorized by legislation.

[35]Amici supporting appellants have cited a number of writers as supporting the remedy of just compensation in regard to regulation (*see, e.g.,* brief of amicus curiae in support of appellants at 53 et seq.). In this regard, however, several writers have questioned the propriety of a monetary remedy (*see, e.g.,* Delafons, *Land Use Control in the United States* (2d ed. 1969) at 110-11; Mandelker, *Inverse Condemnation: The Constitutional Limits* (1966) Wis. L. Rev. 3, 48-49). A number of writers have suggested legislative provision for damages in certain cases of regulation (*see, e.g.,* Carmichael, *Transferable Development Rights as a Basis for Land Use Control,* 2 Fla. St. U. L. Rev. 35 (1974); Rose, *A Proposal for Separation and Marketability of Development Rights as a Technique to Preserve Open Space,* 2 Real Estate L.J. 635 (1974); Costonis, *The Chicago Plan, Incentive Zoning and the Preservation of Urban Landmarks,* 85 Harv. L. Rev. 574 (1972); Krasnowiecki and Paul, *The Preservation of Open Space in Metropolitan Areas,* 110 U. Pa. L. Rev. 179 (1961); Bossleman, Callies and Banta, *The Taking Issue, supra*). Some commentators have advocated that the damage remedy is excessive (*see, e.g.,* Girard, *Agins: A Step in the Right Direction,* Land Use L. & Zoning Dig. (September 1979); Magavern, *The Evolution and Extension of the New York Law of Inverse Condemnation,* 24 Buff. L. Rev. 273 (1975); Clark and Kidman, *The Relationship of Just Compensation to the Land Use Regulatory Power,* 2 Pepperdine L. Rev. 79 (1975); Comment, 26 Stan. L. Rev. 1439 (1974); Beuscher, *Land Use Controls: Cases and Materials* (3d ed. 1964) at 538-50; Note, 66 Harv. L. Rev. 1134 (1953)).

when they point to the political and social turmoil that would be raised in passing new legislation to meet judicial rulings. (appellants' brief, at 43 n. 23). Appellants also suggest that the balance sheet of a public agency would be the same after acquisition. Such is not the case, as public agencies would be judicially compelled to acquire, in many instances, negative easements in the nature of restrictions on development and in order to preserve the underlying regulation (e.g., agricultural land), those interests would have little value and could not be sold. Furthermore, placing public agencies into competition with the private sector by having them engage in the land acquisition and sale business on a massive scale would seem to be more appropriately a legislative decision.[36]

C. Physical Invasion Concepts Are Not Applicable.

As this Court observed in *Penn Central Transp. Co. v. New York City, supra,* government actions that have as their effect the acquisition of resources to permit or facilitate uniquely public functions have been recognized as compensable takings. *Id.* at 128. As noted previously, concepts of fairness suggest the propriety of compensation where an owner has lost an interest in property by governmental acquisition for a direct public use. These considerations are not raised in the regulatory context.

Thus, appellants' suggestion that *Hurley v. Kincaid* (1932) 285 U.S. 95 is dispositive is simply erroneous. In that case suit was brought by downstream owners to en-

[36]Several of appellants' amici suggest that agencies will constantly readjust their position following adverse court rulings. This is pure surmise since it is not involved in the facts as alleged in this case. To premise a constitutional doctrine on the supposition that governmental authorities will generally act in bad faith and attempt to circumvent judicial decrees would be inappropriate. Significantly, it is just not likely that the courts will lightly sanction evasions of their orders. Remedies such as retention of jurisdiction or contempt are available.

join a flood control project on the ground that it would flood their property. This Court rejected injunctive relief but did conclude that construction of the project could require compensation for flooding. Not only does *Hurley* obviously fall into the physical invasion category, it is also an example of the Court's recognition of governmental purpose. An injunction could frustrate carrying forth of the public works project while an award of damages under the Tucker Act allowed the project to proceed, as contemplated by Congress, and allowed damages, as contemplated by Congress. This case, as well as the other cases cited for this proposition (*Dugan v. Rank* (1963) 372 U.S. 609; *Fresno v. California* (1963) 372 U.S. 627; *Regional Rail Reorganization Act Cases, supra;* and *United States v. Gerlach Livestock Co.* (1950) 339 U.S. 725) have no application in the present context.

Where land has been physically appropriated by government there is lacking the potential conflict between the governmental power to regulate and the Takings Clause. It is the balancing of interests in the latter circumstance which is involved here. The courts, perhaps as much pragmatically as analytically, have recognized this difference and have not awarded compensation in the regulatory context.

V

SUPPOSED EXCLUSIONARY EFFECTS AND IMPACTS ON THE COST OF HOUSING ARE NOT ISSUES IN THIS CASE.

Appellants and their amici suggest that the City's zoning ordinances have an exclusionary effect and will operate to increase the price of housing. These are not issues which were raised below, either in the pleadings or in the arguments presented.[37]

---

[37]In *Warth v. Seldin* (1975) 422 U.S. 490, the Court held that property owners have no standing to assert the rights of third parties who claim to be excluded. *Id.* at 509-10.

The owners sought relief for themselves by way of compensation (or invalidation per their count in declaratory relief). The late assertion of exclusionary effects lacks credibility since there is no rational connection between awarding appellants just compensation, as they seek, and providing relief to third parties who supposedly are excluded. If a local government were intent upon excluding outsiders and if a court were to award just compensation for the taking of a particular parcel of property, the local government, upon acquiring ownership, would not likely make the land available to outsiders.

Moreover, appellants' complaint alleges no facts which could establish that the City is using its plans and zoning ordinances for exclusionary purposes. Instead, appellants wish to argue such exclusionary intent and effect from the fact that their land was not zoned for a higher density. The appellants also ignore the numerous statutory requirements imposed on the City as it determines the mix and density of land uses. For example, California law requires the City to have a housing element in its general plan which makes "adequate provision for the housing needs of all economic segments of the community." Cal. Gov't Code § 65302(c).

In the same regard, the concern expressed over housing costs is a classic example of a concern properly directed to a lawmaking body. There are innumerable factors which must be balanced in the adoption of a land use regulatory system. The density of residential use assigned by the City to appellants' land is balanced by other densities in other locations, and it is up to the City, not the appellants or the courts, to make the complex determinations as to which use goes where. So long as the balance struck does not infringe on fundamental rights and is not arbitrary or unreasonable:

> The federal court is not a super zoning board and should not be called on to mark the point at which

legitimate local interests in promoting the welfare of the community are outweighed by legitimate regional interests.

Construction Industry Ass'n v. City of Petaluma (9th Cir. 1975) 522 F.2d 897, 908.

CONCLUSION

For the foregoing reasons appellee, City of Tiburon, respectfully requests that the judgment of dismissal be affirmed.

Date: March 24, 1980

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FOR ARGUMENT

Supreme Court, U.S.
FILED
APR 10 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1979
No. 79-602

DONALD W. AGINS AND BONNIE G. AGINS,
Appellants,

vs.

CITY OF TIBURON,
Appellee.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

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IN THE

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No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,

Appellants,

vs.

CITY OF TIBURON,

Appellee.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

APPELLANTS' REPLY BRIEF.

Introduction.

The basic strategy of Appellee and most of its *amici* is to treat this controversy not quite as it factually is but to assume that what is in issue here is "pure" regulation; *i.e.*, a regulatory enactment unaccompanied by any governmental acquisitory purpose or activities. To that end the record reflecting the Appellee's plans, studies, announcements and appropriations, specifically and avowedly aimed at acquisition of the subject property as an "indispensable" part of city-owned open space, as well as the on-again, off-again condemnation, and their *combined* impact on the utility and value of the subject property are virtually disregarded.

Put another way, Appellee and friends simply ignore Appellants' arguments presented in Appellants' Brief at pp. 26-30. More importantly, they likewise ignore this Court's

analysis of taking criteria enumerated in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 128 (1978), and emphasizing that governmental actions that may be characterized as acquisitions of resources constitute a factor of peculiar significance in the highly fact-dependent inquiry as to whether a taking has occurred. In contrast, in Appellee's hands this important factor is treated as if it had no significance or did not exist.[1]

Therefore, Appellants must note at the outset that virtually all of the arguments of Appellee and friends are based on a factually deficient premise. What is alleged here is a *de facto* deprivation of *all* utility and value of the subject property brought about by the totality of Appellee's *entire* course of conduct. Unless these facts are kept in mind (as they must be, this being a case of dismissal following a general demurrer), the pertinent legal principles cannot be properly applied, and no amount of arguments going to abstract legal concepts or invoking public policy can make up for the crucial failing of not dealing candidly with *all* the facts of *this* case. To that extent, virtually all legal arguments pre-

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[1]To be sure, the Solicitor General (Brief of the United States, at pp. 21-22, fn.11) strives to gloss over this issue in a lengthy footnote. Unfortunately, that argument does not address the *cumulative* totality of *all* of Appellee's activities and their *combined* impact on the subject property (nor can it, that being a clear issue of fact that cannot be honestly dealt with, absent evidence and consideration of factual inferences). Rather, that argument exemplifies so-called "salami tactics"; *i.e.*, it evades the issue by attempting to separate it into pieces, and then addressing one piece at a time as if the others did not exist. That ingenious approach cannot be squared with this Court's commitment to case-by-case adjudication of the peculiar facts of each individual case. Moreover, under California law (this being an appeal from a dismissal following the sustaining of a general demurrer without leave to amend as to the inverse condemnation cause of action) the allegations of the Appellants' complaint must be liberally construed, and all reasonable inferences, favorable to the pleader indulged in. Cal. Code of Civil Procedure §452. *Terry Trading Corp v. Barsky*, 210 Cal. 428, 438, 292 P. 474.

sented by Appellee and its *amici* are inherently deficient[2] because they lack a proper, honestly articulated factual basis pertinent to *this* controversy as actually presented. Appellants respectfully ask the court to bear these considerations in mind in considering this case.

It should also be noted by way of introductory clarification that some of Appellee's *amici* seem to be confused as to California law of remedies. Appellants sued seeking two remedies: (a) just compensation by way of inverse condemnation, and (b) declaratory relief by way of determination of unconstitutionality of the ordinance. The California Supreme Court denied the latter form of relief because under California law declaratory relief may be used only to challenge the *facial* constitutionality of laws (see *State v. Superior Court* (*Veta*), 12 Cal.3d 237, 251, 115 Cal.Rptr. 497, 524 P.2d 1281 (1974)). The court below thereby did not determine that the ordinance worked no taking (as erroneously asserted by some of Appellee's *amici*), but only that such a taking did not appear *on the face of the ordinance*. That, of course, in no way deals with the question of whether (notwithstanding the language of the ordinance) any reasonable use can in fact be made of the subject property, *Nectow v. Cambridge*, 277 U.S. 183 (1928).

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[2]This is implicitly recognized in the voluminous brief of the Conservation Foundation, *et al.*, which unabashedly goes outside the record in an effort to conduct something in the nature of a trial in writing. Appellants reject the invitation to engage in such an endeavor;*this* is no place for it. They offer as a short reply the following query: if Appellants' cause is nearly as factually deficient as asserted by these *amici*, would it not follow that the *amici* should welcome a trial on on the merits, where—if their argument has any merit—Appellants would quickly suffer a defeat? Moreover—and far more importantly—this is the United States Supreme Court, not a trial court. This Court decides national constitutional law and policy; it does not sit as a trier of fact for Marin County. In short, if a determination of facts and factual inferences is what is wanted, the cause ought to be remanded for trial.

In other words, whether an effective taking of the subject property occurred in fact (*i.e.*, by the impact of the ordinances *and the other city acts alleged*, in their totality), could only be reached by the inverse condemnation action which—until the California Supreme Court spoke in the case at bench[3]—was the way in which to examine the impact of the specific facts on the aggrieved owner's property rights. Moreover, the issue is *not* what any state deems to be controlling; this is an avowedly *federal* constitutional issue, and it is for this Court to say what type of factual inquiry into the facts is required to establish a taking, and what remedy is appropriate. As Mr. Justice Holmes put it in *Davis v. Wechsler*, 263 U.S. 22, 24 (1923):

> "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

1.

PRELIMINARY OBSERVATIONS ON ARGUMENTS OF APPELLEE AND ITS AMICI.

The wide-ranging Appellee's Brief and the avalanche of *amici* briefs filed in its support make it appropriate to bring the arguments contained there within some manageable bounds, before addressing the specific legal arguments

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[3]It must be observed that (as noted by Clark, J., in his dissent below—J.S.A., pp. 20-21, fn. 3) California has for a long time adhered to the view that once a taking has occurred, public use was deemed to attach, and the owner's *sole* remedy was inverse condemnation; see *e.g.*, *Hillside Water Co. v. City of Los Angeles*, 10 Cal.2d 677, 688, 76 P.2d 681 (1938). All of this law and its rationale were simply ignored by the majority opinion below in a sudden change of state law. *Cf. Hughes v. Washington*, 389 U.S. 290 (1967).

sought to be made there. To that end some general preliminary observations seem in order:

A. Appellants Contend That It Was Error for the Court Below to Promulgate the Absolutist Dogma That Just Compensation Is Never Available for Regulatory Takings; the Converse Arguments Ascribed to Them Are Spurious.

Appellee and its *amici* distort Appellants' legal argument to a shocking extent. Appellants do *not* contend that just compensation is the *only* remedy in regulatory takings. *A fortiori*, they do not contend that just compensation is or ought to be payable in every case of regulation that results in *any* diminution of private property values; indeed, the imputation of the latter argument to Appellants is simply intellectually dishonest. Appellants' view is that the problem of takings is so heavily dependent on the specific facts of each individual case (as so often noted by this Court) that their exploration in terms of impact on the subject property and its aggrieved owner is indispensable in terms of fashioning a remedy. Thus, for example, to a landowner whose ownership or interest in land has been completely wiped out by regulatory maneuverings so that whatever he had is gone, it is grotesquerie, right out of Franz Kafka's writings, to be lectured about invalidation as a "remedy."[4]

---

[4]California case law increasingly involves cases in which landowners lost their land by foreclosure while being compelled to joust with the ever-turning regulatory windmills erected in their path by local entities. See *e.g.*, *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353, 1366-1367 (1978, 9th Cir.); *Orsetti v. Fremont*, 80 Cal.App.3d 961, 146 Cal.Rptr. 75 (1978), *Hollister Park Investment Co. v. Goleta County Water Dist.*, 82 Cal.App.3d 290, 147 Cal.Rptr. 91 (1978); *Frisco Land & Mining Co. v. State*, 74 Cal.App.2d 736, 141 Cal.Rptr. 820 (1977). Also see, *Klopping v. City of Whittier*, 8 Cal.3d 39, 58, 104 Cal.Rptr. 1, 500 P.2d 1345 (1972), *County of Los Angeles v. Berk*, 26 Cal.3d 201, ... Cal.Rptr. ...., ... P.2d .... (1980).

The issue before the Court is not Appellants' supposedly rigid pro-compensation view, but the California Supreme Court's absolutist pronunciamento that just compensation is *never* available, *no matter how flagrant the non-physical taking* accomplished by land use regulation, and *no matter how severe its impact*. That court simply set itself at war with the principle of case-by-case adjudication that weighs the facts of each controversy, and by fiat did away with the monetary remedy, irrespective of the individual facts. It is the correctness of *that* dogmatic proposition that is before the Court for review, *not* its converse. Once that true issue is confronted, Appellee's assertion that the opinion below rests on sound law collapses; it does so even on the very authorities relied on by Appellee.[5]

Thus, in *Fred F. French Investing Co. v. City of New York*, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976), the New York Court of Appeals was careful to delineate areas where just compensation *does* remain available as a remedy for a non-physical taking. (Even so, the New York position has been soundly criticized; see, Note, *De Facto Takings and the Pursuit of Just Compensation*, 48 Fordham L. Rev. 334 (1979)). So did the Supreme Court of North Dakota in *Eck v. City of Bismarck*, 283 N.W.2d 193, 201. So did the courts of Florida: *Moviematic Industries, Inc. v. Dade County*, 249 So.2d 667, 672 (1977, Fla.App.); *Estuary Properties, Inc. v. Askew*, ... So.2d .... (1979, Fla.App.); *Askew v. Gables-by-the-Sea*, 33 So.2d 56 (1976, Fla.App.).

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[5]Needless to say, even on Appellee's faulty premise, such state court decisions are of little precedential authority in light of *Lake County Estates v. Tahoe Regional Planning Agency*, ... U.S. .... 59 L. Ed.2d 401 (1979) The notion embedded in Appellee's arguments, of the tenor that such state court decisions are authoritative on the federal constitutional point in issue, has a quaint, positively *ante bellum* quality.

So did the courts of Colorado: *Hermanson v. Board of County Comm'rs., etc.*, 595 P.2d 694, 695 (1979, Colo.App.).

The point is that these are all states whose courts opt for the invalidation remedy as the *primary* remedy. Yet, they all recognize as a matter of logic and basic fairness that circumstances can and do arise where a non-physical taking has occurred but a declaration of invalidation is useless (such as where the injury has already occurred; see *Butz v. Economou*, 438 U.S. 478, 504-505 (1978)). It is only California whose courts have taken the dogmatic position that even where it can do no possible good, invalidation is the *only* remedy.[6]

Above all, this Court was careful to note the availability of the civil rights damage remedy in *Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, ... U.S. .... 59 L.Ed.2d 401 (1979).[7]

Thus, any rigid, unyielding absolutism that may be present in this case lies on the Appellee's, not Appellants', side of the argument.

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[6]Please note that since the earlier briefing by Appellants yet another state court opted in favor of inverse condemnation rather than mandamus: *Clifton v. Berry*, 259 S.E.2d 35 (1979, Ga.). For a concise survey of the division of states on this issue see the Jurisdictional Statement (hereafter cited as J. S.) at pp. 19-22, and [Appellants'] Response to Motion to Dismiss or Affirm, at pp. 12-13.

[7]In connection with *Lake County Estates*, Appellants note with bemusement reliance by Appellee and some of its *amici* on *Jacobson v. Tahoe Regional Planning Agency*, 474 F.Supp. 901 (1979, D. Nev.), in which a trial judge apparently defied this Court, and on remand purported to rule that in spite of the plain language of 42 U.S.C. §1983 creating liability ". . . in an action at law . . .", and in spite of *Lake County Estates*, he would afford no such remedy, and then presumably for good measure refused to entertain a plea for a non-monetary remedy as well, and dismissed the action. While no doubt unintended by Appellee, that decision provides a penetrating commentary on the state of pertinent law, and the attitude of some toward property rights—an additude that could stand some corrective action by this Court.

B. Large Judgments Can Threaten Only if the Constitution Is Being Violated on a Large Scale; if so, All the More Reason for This Court's Corrective Intervention.

Appellee (and particularly its *amici*) can scarcely be serious when they intone their doomsday cry of impending fiscal catastrophe. If ever there was an argument that proves too much, this is it.

If a dramatic "financial disaster"[8] threatens, that can only mean one thing (assuming the argument to be anything but frivolous): private property is being confiscated on a large scale. As this Court noted in *Davis v. Passman*, ... U.S. ...., 99 S.Ct. 2264, 2217 (1979), damages can only accrue when the Constitution has been violated. Surely, the parties making such assertions are not seriously contending that the American judiciary is endemically unable to distinguish between meritorious and frivolous claims.[9] Such implicit argument is itself frivolous; as every lawyer with pertinent experience knows, an inverse condemnation suit undertaken on behalf of an owner is a formidable task with victory

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[8]Brief of the Conservation Foundation, *et al.*, at p. 45

[9]But then again, see *amicus* brief of State of California, p. 51, fn. 21, which unblushingly deplores the very essence of the flexible case-by-case approach to taking problems, that this Court has repeatedly endorsed in recent cases. Given the State's professed horror at the prospect that trial judges tend to resolve issues before them on the basis of their ". . . individualized analysis of the conflicting evidence" (*Id.*), one is left to wonder as to how the State proposes to resolve individual disputes in the courts. This bizarre argument seems to be premised on the avowed notion that courts ought to stultify their most basic function of adjudication for the sake of administrative convenience (*i.e.*, to allow a regulatory agency "to draw a hard and well-defined line as to the permissible extent of its powers" as opposed to "that variable reality" of case-by-case adjudication—*Id.*). This is nothing short of saying that the courts should not be permitted to consider the constitutionality of administrative acts *as applied*, lest it interfere with regulatory agencies' "line drawing". That does not leave much of judicial pre-eminence in constitutional matters.

elusive and just compensation long delayed. It is a drastic measure of last resort. (See Huxtable, *Inverse Condemnation—Its Structures, Advantages and Pitfalls*, 1977 Institute on Planning, Zoning and Eminent Domain, Southwestern Legal Foundation, 219, 247-250).

Such arguments were probably best dealt with by the great past Chief Justice of California, Roger Traynor, who said of such doomsday cries:

> "The tenet of lag, strengthening the already great restraints on the judge, is deservedly respected. It bears noting, however, that it is recurringly invoked by astute litigants who receive aid and comfort from law that is safely behind the times with the peccadillos of yesteryear and has not caught up with their own. At the slightest sign that judge-made law may move forward these bogus defenders of stare decisis conjure up mythical dangers to alarm the citizenry. They do sly injury to the law when the public takes them seriously and timid judges retreat from painstaking analysis within their already great constraints to safe and unsound repetitions of magic words from the legal lore of the year before much too long ago." Traynor, *No Magic Words Could Do It Justice*, 49 Cal.L.Rev. 615, 620 (1961).

And so it is here; logic tells us that if large judgments threaten, that can only mean that egregious and widespread takings have occurred. *Davis v. Passman, supra*, 99 S.Ct. at 2278. That, in turn, can only mean that the Constitution is being violated on a massive scale by local regulatory entities. That, with all due respect, is hardly a condition that commends itself to protective judicial solicitude. Appellee and its *amici* seem to have forgotten that the polestar of American constitutional jurisprudence is the judicial adherence to the oath of office which commands each judge

to respect the Constitution above all. That is the foutainhead of American judicial supremacy in constitutional interpretation: *Marbury v. Madison*, 1 Cr. (5U.S.) 137, 180 (1803). Making the lot of the Constitution's effectively self-confessed large-scale violators easy, cheap and convenient would not appear to fit that jurisprudential and ethical principle.

Moreover, such arguments collapse even on their own unsound premise; even if just compensation is not an appropriate *remedy*, that still leads one ineluctably to the concession that widespread takings are occurring (how else could there be a threat of massive judgments?). What these parties are thus *really logically* saying is that even if they are right, the courts have been remiss in failing to invalidate large numbers of regulations. Again, the argument is tantamount to concession of massive constitutional violations.

And so, even accepting *arguendo* the extravagant assertion that a "financial disaster" threatens, the perpetrators of such massive constitutional disregard had best mend their ways rather than ask for a license to continue. These are matters that, in Professor Michelman's apt words, call

> ". . . for resolute sophistication in the face of occasional insistence that compensation payments must be limited lest society find itself unable to afford beneficial plans and improvements. What society cannot, indeed, afford is to impoverish itself. It cannot afford to instigate measures whose cost, including costs which remain 'unsocialized' exceed their benefits. Thus, it would appear that any measure which society cannot afford or, putting it in another way, is unwilling to finance under conditions of full compensation, society cannot afford at all." Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1181 (1967).[10]

Appellee and its *amici* are shrilly demanding nothing less than a rule that would favor the constitutional violator and disfavor the individual citizen seeking *effective* (not theoretical) vindication of his rights protected by the Bill of Rights. They are demanding nothing less than a rule that would make concededly flagrant constitutional violation cheap, convenient, and in the long run virtually risk-free. They ought to be informed that here as elsewhere there is no such thing as a free lunch.

> ". . . [V]indication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them." *Watson v. Memphis*, 373 U.S. 526, 537 (1963).[11]

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[10]This astute observation spotlights the inherent immorality underlying the Appellee's arguments, whereby in an inversion of the Robin Hood principle, a conspicuously wealthy community would enhance its enviable condition at the expense of one of its inhabitants, without paying for what it gets. Such concerns reach some sort of nadir in the *amicus* brief of the Federation of Hillside and Canyon Associations. These denizens of legendary pinnacles of exclusivity, displaying the most spectacular accumulation of wealth in the West, comprised in disproportionate measure of business tycoons, show business personalities, successful professionals, and all sorts of entrepreneurs, come before this Court and fervently denounce, of all things, profits (see *Id.* at p. 29), thereby displaying not only awe-inspiring chutzpa but also a lamentable lack of understanding of the present record (*i.e.*, since the courts below denied liability, the issue of measure of damages was never reached; moreover, such measure does not include profits in any event—see Appellants' Brief, at pp. 33-34, fn. 14).

[11]For a detailed exploration of the principle that an asserted shortage of funds is no justification for violation of constitutional rights, see *Gates v. Collier*, 501 F. 2d 1291, 1319-1320 (1974, 5th Cir.). That principle is *a fortiori* applicable here, considering the economic make-up of Tiburon. In other words, what we have here is an unwillingness, not inability, to pay for the acquisition.

C. The Invalidation "Remedy" Is de Facto Not Available in California.

Appellee espouses a far more favorable view of the invalidation remedy in California than reality justifies. Appellants stand by their contention that there has been no reported case of invalidation *on grounds of taking* in California since *Hamer v. Town of Ross*, 59 Cal.2d 776, 31 Cal.Rptr. 335, 283 P.2d 376 (1963). Appellants further suggest that—with all due respect—Appellee has misinterpreted the case on which it principally relies (*Furey v. City of Sacramento*, 24 Cal.3d 862, 157 Cal.Rptr. 684, 598 P.2d 844 (1979)), and has failed to note its literal and legal bottom line. *Furey* did not invalidate anything; it merely remanded the cause to the trial court with directions that at first absolutely nothing be done (See 24 Cal.3d at 878), in deference to a foreshadowed special reassessment proceeding (See 24 Cal.3d at 873), without a hint as to how or *when* this would occur, or with what results. Moreover, *Furey* gives no indication as to the nature of the reassessment: Is it to be prospective only (*i.e.*, involving reduction or cancellation of future payments)?, or, is it retroactive?; and if the latter, is the entire assessment to be voided, or is there to be a new reassessment in some lesser amount, and if so, how determined?

In short, *Furey* invalidated absolutely nothing; it only gave a vague promise of delay and more litigation virtually certain to consume years,[12] during which the owner continues to be denied the right of rational use.[13]

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[12]Since interest in such proceedings accrues at 7% (See Cal. Streets & Highways Code §5503), and the current rate of inflation hovers around 18%, little imagination is needed to envision the diligence with which such reassessment is likely to be pursued.

[13]A most penetrating insight into the efficacy of this supposed "invalidation" is provided by the fact that the ostensible winner (*i.e.*, the landowner) went to the trouble and expense of seeking review by this

As for the many cases collected at Appellee's Brief, p. 28, fn. 24, not one of them struck down a regulation as working a taking. What purpose their citation serves is thus obscure.[14]

And so it is with the other California post-1963 cases cited by the parties; they speak for themselves, and need not be further discussed.[15] In *none of them* did a landowner receive any relief for confiscatory regulations; not even in cases of bankruptcy and foreclosure caused by inability to use one's land (See *supra*, fn. 4). What happens all too often is that landowners seeking to use their land are confronted with unceasing change in the regulations, until their economically viable stake is effectively destroyed. *That* is how it is done in California; no regulation is stable; nothing is reliable; indeed, Appellee expressly concedes this.[16] No

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Court, while the ostensible loser stoutly resisted such review, proclaiming itself delighted with the decision of the California Supreme Court, in which it supposedly lost. A most curious epilogue to this "invalidation."

[14]On the other hand, this may be a somewhat Freudian insight into prevailing California governmental mentality, suggesting the presence of a view that whenever a landowner wins in California (on *any* grounds), these days that is somehow remarkable.

[15]Except for one. In the *amicus* brief of the State of California (p. 50, fn. 20) one is startled to come across an assertion impugning the integrity of Appellants' counsel in discussing the *Briggs* case. Since the State is correct in foreshadowing an imminent review of *Briggs* by this Court, the Court will have an early opportunity to assess for itself the accuracy of the State's assertion that in *Briggs* the trial court awarded damages ". . . based *solely* on the permit denial" (*Id.*, emphasis in the original). For now, a pointed reference to A.B.A. Code of Professional Responsibility, Canon 7, Ethical Consideration 7-14 (on the obligation of government counsel to present the courts with "a full and fair record") should suffice.

[16]At Appellee's Brief, p. 25, fn. 21, Appellee takes pride in the fact that "[z]oning, by its nature is not permanent", and then leaps to the *non sequitur* that zoning, therefore, can never work a taking because supposedly a "taking" must be permanent (this, of course, is simply wrong; takings can and often are temporary, as more fully discussed, *infra*). This further instance of an argument that proves too much, bears an alarming kinship to the sad (if familiar) notion that a successful shell game requires its operator to keep the shells in motion. Hardly an endorsement of zoning.

rights are said to be "vested" until construction is underway. This point is probably best made by an extended quotation[17] from a California appellate court which felt bound by precedent to deny relief, even though its conscience was obviously shocked. *This* is California reality of today:

> ". . . the denouement of this lawsuit leaves the members of this court, as appellate chancellors in equity, with a dissatisfied sense of justice. In hard fact, Raley spent $150,000 in reliance upon a land-use permit lawfully granted by a state instrumentality which was then repudiated by a related state instrumentality. The two agencies had overlapping membership and occupied a relationship of mutual awareness and privity. (See *Lerner v. Los Angeles City Board of Education*, 59 Cal.2d 382, 398-399 [29 Cal.Rptr. 657, 380 P.2d 97].)
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> "Several factors combined to cause the developer's loss and prevent its redress. Raley is the victim of maladroitly engineered environmental controls. California's current need for 200,000 new jobs each year can be met only by a flow of venture capital. The protection of the state's remaining environmental amenities unavoidably constricts this flow. The competing needs of economic development and environmental protection can be brought into balance only through competent, speedy and authoritative decision-making. "California is faced with a bewildering number of conflicting planning jurisdictions, none of which have the responsibility or the capability to adequately carry out comprehensive regional planning. . . . Most state-mandated planning is done by numerous overlap-

[17]Appellants beg the Court's indulgence for the length of this quotation; it needs, however, to be given full expression, coming as it does, not from an interested party, but from the pen of one of the most respected and articulate members of California's appellate judiciary.

> ping single-purpose agencies (there are over 100 in the state), each with a varying degree of authority to enforce its plan." (Marks & Taber, *Prospects for Regional Planning in California*, 4 Pacific L.J. 117, 118, 124; see also, Comment, 25 Hastings L.J. 1165.)
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> "The mechanism at work here combined to 'protect' the environment by protracted and undependable administrative procedures followed by years of litigation. Only the most hardy and well-heeled can run so harsh a gauntlet.[18] Burdened by land costs, loan interest, architectural, engineering and attorney fees, many entrepreneurs run out of money or heart or both long before the finish line.
>
> "Handmaiden of prevailing administrative anarchy is the vested rights rule, as voiced by the authoritative decisions cited earlier. The vested rights rule gives a green light to administrative vacillation virtually up to the moment the builder starts pouring concrete. The rule has been described as a 'common law' rule and as a 'constitutional common law principle.' It is neither. The rule, as we have observed it, is a manifestation of equitable estoppel.

[18]"In a recent description of America's most acute needs for speed and economy in dispute resolution, Chief Justice Warren Burger declared: 'Ways must be found to give appropriate weight to ecological and environmental factors without foreclosing development of needed public works and industrial expansion by inordinate delays in litigation. The accommodation of the conflicting values demands that there be a swift resolution of those cases, so as to avoid the waste involved in suspending execution of large projects to which vast public or private resources are committed. This country has appropriately committed itself to protecting our environment, but we must also build needed schools, homes and roads, and in the process provide jobs.' Address given at National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice in April 1976, reprinted under the title, *The Direction of the Administration of Justice* (1976) 62 A.B.A.J. 727"

"Historically, estoppel was administered by the equity chancellor; its function was justice and good conscience; it was evoked by motives of equity and fair dealing in order to prevent the inequitable enforcement of *other* rules of law. (3 Pomeroy's Equity Jurisprudence (5th ed.) § 802, pp. 180-181.) Equitable estoppel bespeaks a thirst for individualized justice, obedient to general doctrine but relatively free of servitude to fixed verbalisms. In the evolutionary dynamics of California environmental law, the plasticity of equitable estoppel has been replaced by the rigidity of the vested rights rule. Doctrinal evolution has come full circle — from the formal, unmoral rigidities of medieval common law to the individualized humanity of equity and back again to the fixed demands of the vested rights rule.

Raley v. Calif. Tahoe Regional Planning Agency, 68 Cal.App.3d 965, 984-985, 137 Cal.Rptr. 699 (1977) footnote 15 omitted.

That is today's California reality—not the fanciful sugar-coated platitudes of Appellee and its *amici*. It is that grim reality that underscores the appropriateness of availability of just compensation as a remedy for egregious abuses, so that any citizen—not merely ". . . the most hardy and well heeled . . ."—can avail himself of effective constitutional protection.

D. The Professed Nobility of Appellee's Asserted Goals Does Not Justify the Use of Unconstitutional Means.

The presentation of Appellee and its *amici* makes a classic example of confusion between ends and means. The pursuit of noble environmental goals no more entitles one to disregard the language and policy of the Constitution than does the pursuit of any other desirable societal goal; see *United States Trust Co. v. New Jersey*, 431 U.S. 1, 29-30 (1977).

For example, all right-thinking people abhor violent criminal acts (which in today's world are a most serious and pervasive problem), but that hardly justifies exhortations to freely swung police truncheons or warrantless midnight raids,[19] even if such were to reduce criminal activity significantly. There are simply some values which *this* society deems so vital as to make them *supreme* law which is not to be subordinated to arguments of efficiency or desirability.[20] Or, as the Massachusetts Supreme Court so aptly put it:

> "In this conflict between the ecological and the constitutional, it is plain that neither is to be consumed by the other. It is the duty of the department of conservation to look after the interest of the former, and it is the duty of the courts to stand guard over constitutional rights." *Commissioner of Natural Resources v. S. Volpe & Co.*, 206 N.E.2d 666, 671 (1965, Mass.)

This Court has likewise expressed itself on this point in *United States Trust Co. v. New Jersey, supra*, 431 U.S. 1, 28-29:

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[19]As Mr. Justice Jackson put it: "If officers search my house and seize my papers, with no threat to my person, only property may be directly touched; but I can think of no greater affront to my person." Jackson, *The Task Maintaining Our Liberties: The Role of the Judiciary*, 39 A.B.A. Jour. 961, 963 (1953).

[20]Indeed, the *amicus* brief of the City of San Jose (at p. 34), after much eloquent circumlocution, eventually gets around to making the vital concessions on which this controversy ultimately centers: what needs to be done to achieve what Appellee and its *amici* really desire is to nationalize privately owned land and to amend the Fifth Amendment so as to spare the takers the inconvenience of having to pay just compensation. Just so! That is exactly what Appellee contends, except that it has not had the temerity to come out and say so as did its *amicus*. But the Constitution still stands *un*amended to such specifications, and so long as it so stands it guards against indirect, as well as direct, attacks on the values it protects. *Macallen v. Massachusetts*, 279 U.S. 620, 629 (1929).

"Mass transportation, energy conservation, and environmental protection are goals that are important and of legitimate public concern. Appellees contend that these goals are so important that any harm to bondholders from repeal of the 1962 covenant is greatly outweighed by the public benefit. We do not accept this invitation to engage in a utilitarian comparison of public benefit and private loss. . . . Thus a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors."

The same is true here.

E. By Claiming That it Cannot Tell When it Violates the Constitution Appelleee Contradicts the Basis of its Central Argument.

The arguments of the Appellee and its *amici* add up to a massive self-contradiction. When it comes to pursuit of regulatory ends, the city is depicted as clear-thinking, conscientious, courageous, respectful of societal values, willing to face hard realities, and dedicated to the public good.[21] Yet, when it comes to implementation of those ends and to the choice of means, the regulators are depicted as inept, confused, and (in spite of lavish assistance by counsel and expert consultants), unable to tell constitutional right from wrong, so that they blunder over the constitutional boundary with such ingenuousness as to lay a claim to a judicial rescue

[21]Although, curiously enough, to the extent local California municipalities have shown an inclination to regulate themselves so as to provide ample room for growth, they are criticized for so doing in the *amicus* brief of the American Planning Association (at pp. 63-64). One begins to wonder to what extent the asserted deference to local regulatory wisdom is being colored by unspoken commitments to idiosyncratic ideologies.

operation that would keep them from having to face the constitutional consequences of their own acts. This, with all due respect, is an image that simply won't wash; if the regulators are astute enough to select and pursue their chosen governmental ends, they should also be responsible enough to select appropriate means. As this Court pointedly noted in *International Paper Co. v. United States,* 282 U.S. 399, 406 (1930):

"The government exercised its power in the interest of the country in an important matter, without difficulty, so far as appears, until the time comes to pay for what it has had. The doubt is rather late."

F. Appellee's Notion of "Chilling" Stands American Constitutional Jurisprudence on its Head, By Demanding That Constitutional Violators Be Favored.

Much is said in support of Appellee's position about a supposed "chilling" of governmental regualtory activities, that is foreshadowed if access to the constitutional remedy of just compensation is reaffirmed by this Court. Appellants suggest in response that the various parties making such arguments have their societal and constitutional values backwards. The concept of "chilling" rests on the idea that the rights incorporated and protected by the Constitution are so precious that the courts stand guard over them, and protect them not only from outright invasions, but also from threatening governmental activities that, though not crudely violative of the constitutional letter, would in reality tend to discourage individuals from availing themselves of those cherished rights. *That* is what "chilling" is all about.

For Appellee and its *amici* to come out boldly in favor of standing this concept of "chilling" on its head, and to demand that the constitutional values be narrowly circum-

scribed, lest those who would violate them be "chilled",[22] is simply an Orwellian inversion of the English language. The ethical and logical basis on which the concept of "chilling" rests means to protect the individual citizen from constitutional overreaching by the powerful government, not the other way around (history teaches that governments tend to take care of themselves). It is indeed supposed to provide disincentives *to the government* when it sets out on a constitutionally suspect path. It would be an anomalous twist, contrary to two centuries of American constitutional jurisprudence, to say that constitutional violations should be encouraged, lest their discouragement work a "chilling" of those who would set out on a path of collision with the nation's organic law and the precious values it enshrines.[23]

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[22]It must be emphatically noted that no one on Appellee's side worries about any supposed "chilling" in the context of invalidation; it is only when it comes to having to pay just compensation that the bogus tocsin of "chilling" rings out. That—Appellants suggest—tells volumes; the commitment of the parties making that argument is thus *not* to the Constitution, but only to their self-interest (i.e., to a remedial legal structure that would make constitutional violations convenient, and above all cheap).

Appellants suggest in reply that confronting a would-be constitutional violator with the prospect of unpleasant consequences is not "chilling"—it is deterrence from wrongdoing.

[23]In that connection, one notes the Appellee's bald assertion (Appellee's Brief. 16) suggesting that no "fundamental rights" are involved here. Significantly, that naked assertion appears as *ipse dixit* in a heading which is not supported by any reason or authority. Suffice it to say in reply that this Court definitively rejected this unsound notion in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972), where it made explicitly clear that the right to ". . . enjoy property without unlawful deprivation . . ." enjoys the same degree of protection as ". . . the right to speak or the right to travel." This principle, in turn, rests on the eminently sensible notion that the most precious "personal" rights cannot be enjoyed by persons whose property rights are not similarly protected. "Neither could have meaning without the other" (*Id.*).

G. Appellee's Arguments Ignore the Concept of Fairness That Is the Cornerstone of the Constitution.

Finally, an observation must be made on one aspect of the arguments of Appellee and its *amici* that is conspicuous by its absence. fairness.

Appellee and friends devote all their policy arguments to the support of governmental convenience, studiously ignoring in the process the idea that the persons who own land in *this* country are not some sort of enemy to be fought, but living, breathing individuals whose lives and lifetimes of work are at stake, and who both deserve and are entitled to the protection promised them by their Constitutions.[24] In the words of a recent commentary:

> "Fairness requires that individuals be treated not merely as means to social ends but rather as persons who deserve respect as ends in themselves. Although fairness standards are necessarily indeterminate, courts faced with particular challenges to zoning measures must nonetheless ask whether those measures exact such a disproportionate sacrifice from individual property holders relative to their peers and to their expectations that the affected individuals may be seen as having been treated solely as a means in a process of social engineering." Comment, *Developments in The Law: Zoning*, 91 Harv. L. Rev. 1429, 1492 (footnote omitted).

Those ethical principles have been wholly ignored by Appellee's arguments.

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[24]The California Constitution (Art. I, §1) symbolically places at its beginning the ". . . acquiring, possessing, and protecting property . . ." as one of the secured ". . . inalienable rights. . . ."

2.

THE OPINION BELOW SQUARELY DEALS WITH THE CONSTITUTIONAL ISSUES OF TAKINGS AND REMEDIES, AND EXPRESSLY BELIES APPELLEE'S "ADMINISTRATIVE REMEDIES" ARGUMENTS.

The matters suggested by the above heading were discussed in Appellants Response to Motion to Dismiss or Affirm at pp. 7-10 (to which the Court's attention is respectfully invited), and need not be repeated at length here. The court below could not have been clearer in rejecting the notion that any "administrative remedies" threshold problem was involved.[25] So did this Court, as discussed presently.

By way of brief summary, the "administrative remedies" argument is without merit because:

(a) What is involved here is a major zoning ordinance which is a legislative, not administrative, governmental act (*City of East Lake v. Forest City Enterprises,* 426 U.S. 668 (1976); *San Diego Bldg. Contractors Assn. v. City Council,* 13 Cal.3d 205, 118 Cal.Rptr. 146, 529 P.2d 570 (1974)). There are no "administrative" remedies

[25]See particularly Appendix A to Appellants' Response to Motion to Dismiss or Affirm, in which the California Supreme Court carefully deleted all references to "administrative mandamus" (the California judicial remedy that serves to review administrative acts), and amended its opinion to make clear that ordinary mandamus (a remedy used to review legislative acts) was its chosen remedy. "Administrative mandamus" is the statutory review procedure of *administrative* acts (Cal. Code Civ. Procedure §1094.5). By long standing and well settled California law, this is a remedy limited to judicial review of administrative matters and is not available to review legislative acts. See *Wulzen v. Board of Supervisors* (1894) 101 Cal.15, 35 P.353, *Strumsky v. San Diego County etc.* (1974) 11 Cal.3d 28, 35, fn. 2, 112 Cal.Rptr. 805, 809, 520 P.2d 29. For an explication of the California legislative intent in adopting Cal. Code Civ. Proc. §1094.5, see *Brock v. Superior Court* (1952) 109 Cal.App.2d 594, 598-601, 241 P.2d 283.

to be pursued here,[26] and, moreover, it is axiomatic that one need not supplicate the legislative to change the law before challenging its constitutionality.

(b) Since, under the facts alleged, a claim of deprivation of constitutional rights is invoked, for which a judicial remedy at law or in equity lies under 42 U.S.C. §1983 (*Lake County Estates v. Tahoe Regional Planning Agency,* .... U.S. ...., 59 L. Ed.2d 401 (1979)), no pursuit of administrative remedies is required in any event (*Damico v. California,* 389 U.S. 416 (1967)). Also, in light of Appellee's consistent and avowed commitment to keeping the subject property as an indispensable part of the City's open space resources, any such pursuit of these non-existent "remedies" would have been futile in any event. (See *Dahl v. City of Palo Alto,* 372 F.Supp. 647, 649, fn. 2, (1974, N.D. Cal.)).

(c) The court below did not base its decision on any such threshold matters but went to the substantive and remedial merits of the federal constitutional issues presented.

(d) The court below decided the very issue tendered by Appellee (See Appellants' Response to Motion to Dismiss or Affirm, at pp. 9-10) and thus Appellee is hardly in a position to argue that the issue was not properly before that court.

(e) Whatever comforting language Appellee may find in the California intermediate appellate court cases it cites, the blunt fact is that in its most recent decision on point, the California Supreme

[26]See *Moore v. East Cleveland,'* 431 U.S. 494, 511-512 (Brennan, J., concurring.)

Court definitively rejected the argument that administrative remedies need to be exhausted before mounting a judicial *constitutional* challenge. *State v. Superior Court* (*Veta*), 12 Cal.3d 237, 250-251, 115 Cal.Rptr. 497, 524 P.2d 1281 (1974).

Aside from these matters, Appellee overlooks that this Court expressly considered *and rejected* that very argument in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926). There, the city argued that the landowner was required to seek permission to use his land contrary to the zoning ordinance before suing. This Court disagreed.

Finally, the California Supreme Court chose to decide a prime constitutional issue that created a harsh precedent going directly to *federal* constitutional rights of Californians. If the court below had intended to base its decision on any threshold procedural matters by state law, it would have said so;[27] instead, it expressly chose to address remedies under the Fifth Amendment. *That* is what is before this Court for review. The issue now ingeniously asserted by Appellee and its *amici* formed no part of the decision below and is thus not properly raised now.

3.

THE PRESENT RECORD MAKES IT CLEAR THAT THE SUBJECT PROPERTY HAS BEEN RENDERED USELESS AND WORTHLESS; ANY FACTUAL CONTROVERSY ON THAT POINT THAT APPELLEE WISHES TO PURSUE SHOULD BE RAISED IN A TRIAL ON THE MERITS.

Much is said by Appellee and its *amici* about Appellants' supposed ''right'' to build at least one house. Putting aside

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[27]When the California Supreme Court wants to deal with the state law of remedies, it knows how to make its purpose clear; see *State v. Superior Court* (*Veta*), 12 Cal.3d 237, 115 Cal.Rptr. 497, 524 P.2d 1281 (1974).

the fact that the allegations (which on this record are the only facts before the Court) are to the contrary, and putting aside the fact that such an argument simply contradicts Nectow v. Cambridge, 277 U.S. 183 (1928).[28] the ordinance before the Court itself belies the supposed ''right''.

While Appellee and friends exhort the ''Uses Allowed By Right'' part of the ordinance as well as its density provisions (see J.S.A. at pp. 31-32), they stop their reading too soon. Immediately following these provisons there come ''Standards'' (J.S.A. at pp. 32-33), which make it crystal clear that nothing can be built on the subject property except by the City's whim, *and* that the owner would literally have to deed the ''open space'' land to the City (J.S.A. at p.32). What these draconian measures leave of utility and value is at best illusory. Surely, Appellants are entitled to show on the merits that the market's reaction is to shun land which (putting all else aside for the moment) would have to be purchased by its users in large lots which then would have to be largely dedicated ''in fee title or of scenic easements'' etc. to the City. Suffice it to say that when given the opportunity an owner may be able to prove that such severe restrictions (that first create large lots and then stultify their use and enjoyment as such), do constitute a taking. That is quite similar to what happened in *Arastra Limited Partnership v. City of Palo Alto*, 401 F.Supp. 962 (1975, N.D.Cal.), where the aggrieved landowner proved just that.

And, of course, there is also the impact on value, utility and marketability of Appellee's avowed and widely publi-

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[28]*Nectow*—relied on by Appellants but completely ignored by Appellee—held that notwithstanding a zoning ordinance's ostensible permission to put the land to some uses, it was proper for a trier of fact to consider the economics of such uses and to conclude that actually such ostensibly permitted uses denied the owner any economically rational use of his land or any return on his investment.

cized intention to make the subject property an "indispensable" part of its "open space", and the on-again, off-again condemnation, all of which Appellee and friends have simply ignored.

In sum, this record makes it clear that Appellants may well be able to prove a taking, given a fair chance and their day in court. That would seem to be their constitutional right, as this Court explained in *Portsmouth Harbor L. & H. Co. v. United States*, 260 U.S. 327, 330 (1922).

4.

THE NATURE OF PROPERTY AND THE EFFECT OF REGULATIONS ON IT LEAD TO THE CONCLUSION THAT A "TAKING" NEED NOT ENCOMPASS THE ENTIRE FEE SIMPLE ABSOLUTE TITLE, BUT MAY INVOLVE ONLY THE TAKING OF A PARTICULAR PROPERTY RIGHT, WITH JUST COMPENSATION AWARDED ACCORDINGLY.

One of the myths extant in the field of inverse condemnation (that is displayed in the "parade of horribles" arguments of Appellee and its *amici*[29] is the legally and logically unjustified notion that if a "taking" is found and payment of just compensation is ordered, that somehow requires the taking entity to acquire involuntarily the entire fee simple absolute title and pay full fair market value of the entire "bundle of sticks" comprising the regulated property. This, in turn, is said to expose regulating entities to ruinous damages for what is but a misstep that goes only

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[29]See, *e.g.*, the *amicus* brief of the State of California, at p. 45, where a crude attempt is made to impute to Appellants an argument that "[s]lightly cross the line . . . and the hammer falls." In fact, as shown presently, that is the myth. The law requires examination of the facts of each case, and a determination of what, if anything, has been taken. Again, any supposed dogmatic approach to this problem lies on Appellee's—not Appellants'—side of the argument.

a bit too far—so goes the argument. (See, *e.g.*, the *amicus* brief of the State of California, at p. 43, where the State agonizes over whether the United States involuntarily bought "an enormous portion" of Virginia). In reality, neither such simplistic all-or-nothing "taking" theory, nor its supposed economically catastrophic sequelae have any substance.[30] Nonetheless, this spurious theory is regularly hauled out of mothballs, and is used to frighten unsophisticated local judges into refusing to grant *any* relief to grievously damaged property owners.[31]

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[30]And neither does the fallacious premise that would depict "regulation" so severe as to work a taking, as a careless misstep by a well-meaning regulatory agency. Not only do such meritless importunings propose that the judiciary ride to the rescue of irresponsible governmental agencies shrinking from facting the consequences of their disregard of the Constitution, but on the facts at bench they lack factual validity as well. What is involved here is a solemnly undertaken act of governance, arrived at only after careful study by leading expert consultants and with assistance of counsel. It was a deliberate process that invoked the full panoply of governmental powers, and took years to accomplish. In short, such arguments do not properly tug at judicial feelings of compassion; rather they are more in the nature of an irresponsible litigant seeking to evade accountability to the Constitution which it is bound to uphold rather than circumvent. The *amicus* brief of the City of San Jose, et al, provides the proverbial "Exhibit A." There (at pp. 5-6) it is argued with a straight face (albeit in flowing prose) that a *confessed* municipal blunder in racing against other cities to incorporate as much territory as possible, and then caving in to political pressure to deny reasonable land uses on the annexed land, is somehow an act of virtue to be rewarded. When viewed with some detachment, this argument is something less than overwhelming in its moral sweep. It does, however, provide a good illustration of what the court in *Raley* (quoted *supra*, at pp. 14-16) aptly called "administrative anarchy."

[31]This observation implies no disrespect to the judiciary at any level. On the contrary, it merely serves to acknowledge the fact of life known well to practicing lawyers, that judges are overwhelmingly generalists and their usual heavy workload is typically composed of criminal prosecutions, tort litigation, divorces, a sprinkling of commercial disputes, and occasional litigation of governmental regulations of businesses. Inverse condemnation cases are quite rare, and therefore it is hardly surprising that a typical state trial judge, bereft of research assistance, and unfamiliar with this arcane field (which has proven troublesome to leading scholars, and indeed, even to this Court with all its enviable resources), may well find himself intellectually intimidated by experienced attorneys' doomsday cries of imminent municipal ruin.

In fact, an analysis of the decisional law shows the myth to be just that. While in *some* cases in which the regulation's impact on the landowner[32] was wholly confiscatory, or where the non-physical taking was brought about by the governmental activities collateral to an overtly acquisitory intent (*as at bench*), courts have occasionally held that a complete taking had occurred. See *Benenson v. U.S.*, 548 F.2d 939 (1977, Ct. Cl.) (severe regulations prevented owner from using the Willard Hotel in Washington while the Government moved to acquire it); *Peacock v. County of Sacramento*, 271 Cal.App.2d 848, 77 Cal.Rptr. 391 (1969) (for several years all uses of subject property—save growing of grass—prohibited while the county tried to decide whether to acquire it for an airport; in the meantime, taxes on that property were raised annually); *Drakes Bay Land Co. v. U.S.*, 424 F.2d 574 (1970, Ct.Cl.), and 459 F.2d 504, 505 (1972 Ct. Cl.) (government successfully interfered with owner's plans for use of its land while awaiting Congressional appropriation to condemn it);[33] *Arastra Limited Partnership v. City of Palo Alto*, 401 F.Supp. 962 (1975, N.D.Cal.), opinion vacated by stipulation following sub-

[32]Please recall that the central criterion of a taking is the owner's loss, not the taker's gain: ". . . The question is, What has the owner lost? not What has the taker gained?": (*Boston Chamber of Commerce v. Boston,*) 217 U.S. 189, 194 (1910). This principle, although first articulated as a rule of valuation, was adopted by the Court as a criterion of taking: "The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking." United States v. General Motors Corp., 323 U.S. 373, 378 (1943). Also see *Kimball Laundry Co. v. United States*, (338 U.S. 1, 13 (1948). Thus, where the governmental conduct has stripped the owner of *all* rights of ownership, a full taking *may* be the result.

[33]A similar case is *Bydlon v. U.S.*, 175 F.Supp. 891 (1959, Ct.Cl.), except that the taking technique there consisted of forbidding access to the subject property. Also see *Pete v. U.S.*, 531 F.2d 1018 (1976, Ct.Cl.), and 569 F.2d 565 (1978, Ct.Cl.) (a long-delayed denouement of the original *Bydlon* controversy).

stantial settlement, 417 F.Supp. 1125 (extensive scheme of ostensible regulations imposed in lieu of acquisition that so burdened the regulated land as to make it unusable); *Richmond Elks Hall Assn. v. Richmond Redevelopment Agency*, 561 F.2d 1327 (1977, 9th Cir.) (impact of announced, then delayed, then abandoned plans to condemn the subject property destroyed its utility and saleability; held: these events amounted to taking of such title as aggrieved owner had, 561 F.2d at 1332).

On the other hand, where the impact of governmental regulatory conduct on the affected land was less severe, courts have held that the "taking" was either temporary, or partial, or both. Thus, in *Sneed v. County of Riverside*, 218 Cal.App.2d 205, 32 Cal.Rptr. 318 (1963), the court held that an ostensible height regulation was in reality a taking of an avigation easement.[34] In *Lomarch Corp. v. City of Englewood*, 237 A.2d 81 (1968, N. J.), a regulation "freezing" land for a limited period of time in contemplation of possible public park uses was held to be a compensable taking of an option to purchase. In *Keystone Associates v. State*, 371 N.Y.S.2d 814 (1975, Ct. Cl.) rev'd. 389 N.Y.S.2d 895, (1976. App. Div.) rev'd. and remanded 45 N.Y.2d 894, 383 N.E.2d 560 (1978, N. Y.), a regulation improperly delaying demolition of the Old Metropolitan Opera House was held to be a temporary *de facto* taking and compensation was awarded on a temporary rental basis. Similarly, in *City of Austin v. Teague*, 570 S.W.2d 389 (1978, Tex.), the offending confiscatory governmental conduct (there, an unjustified permit denial) was interdicted by non-monetary judicial declaration while in the same pro-

[34]Similarly, in *United States v. Causby*, 328 U.S. 256 (1946), this Court did *not* require that Causby's land be acquired *in toto;* on the contrary, the matter was remanded to the Court of Claims to define with particularity the nature and extent of the *easement* found to have been taken there. See U.S. at 267-268.

ceeding the owner was awarded compensation for out-of-pocket losses incurred by reason of the improper governmental regulatory intervention. Accord, *San Antonio River Authority v. Garrett Bros.*, 528 S.W.2d 266 (1975, Tex. Civ. App.). And in *Gordon v. City of Warren*, 579 F.2d 386, 387 (1978, 6th Cir.), it was alleged that the wrongful municipal regulatory activities effected a *temporary* taking, and this was held to state a proper cause for relief under the Fourteenth Amendment.

Of particular interest are cases in which the government engaged in inequitable precondemnation activities that so trenched on the landowner's rights of use and enjoyment of his land as to work a non-physical taking, but then the governmental acquisition plans were abandoned before all of the involved property rights were destroyed. In such situations courts found a taking but awarded just compensation only for the temporary invasion of the owners' property rights. See *Washington Market Enterprises, Inc. v. City of Trenton*, 343 A.2d 408 (1975, N. J.), and *Jones v. People*, 22 Cal.3d 144, 148 Cal.Rptr. 640, 583 P.2d 165 (1978).

Still other cases involved situations where the aggrieved landowners availed themselves of the remedy of invalidation of the confiscatory regulation, and after securing judgments to that effect, sued for just compensation to provide them with monetary redress for the temporary loss of use[35] of

[35]It is, of course, basic that the very idea of "property" rests on the notion that its owner has the right to use and enjoy it subject only to *reasonable* regulation (*Buchanan v. Warley*, 245 U.S. 60, 74 (1917)). Indeed, California defines property in terms of "ownership" which, in turn, is defined as ". . . the right of one or more persons to *possess and use* it to the exclusion of others," Cal. Civil Code §654, emphasis added. In that connection, please recall that for purposes of applying the protection of the Constitution to "property," this Court looks to state law's definition of "property"; see *United States ex rel. TVA v. Powelson*, 319 U.S. 266, 279 (1943); *Sauer v. New York*, 206 U.S. 536, 548 (1907). For an extensive collection of federal cases applying this principle, see Annotation 1 A.L.R.Fed. 479, 482-483.

their property during the time consumed in obtaining a judicial declaration of the regulation's invalidity. See *Gordon v. City of Warren, supra*, 579 F.2d 386; *Sixth Camden Corp. v. Township of Evesham* 420 F.Supp. 709 (1976, D. N. J.); *Keystone Associates v. State*, 333 N.Y.S.2d 27, (1972, App. Div.) aff'd. 307 N.E.2d 254 (1973, N.Y.).

Finally, some courts have fashioned a flexible remedy whereby the regulation is found to work a taking, and thereupon the regulating entity is ordered either to allow the owner to proceed with his proposed land use or to initiate condemnation proceedings promptly. See *Estuary Properties, Inc. v. Askew*, ... So.2d .... (1979, Fla.App.). This approach too does not compel full acquisition of the "taken" property but rather confronts the regulating entity with an intelligent decision whether the public benefit to be derived from the community's asset enhancement warrants the cost. It is, in other words, a situation in which the courts quite properly present the bill for the illusory "free lunch", while its would-be consumer may opt out of the feast now that it is no longer "free".

In sum, the concept of non-physical takings, as any other takings, is premised on the sound and settled principle that a compensable taking may be found to exist but, even so, it need *not* be a *permanent* taking of the owner's *entire* "bundle of sticks." Depending on the specific facts and particularly on the nature and extent of the impact of governmental action on the subject property, it may only be a taking of a limited property interest, possibly for a limited period of time. In such cases the taking entity pays only for those rights it has taken, and only for the duration of the taking.[36]

[36]It cannot go without emphasis that the California Legislature contemplated this very possibility when in Cal. Gov't. Code §6953 it expressly authorized resales of land acquired for open space. It likewise cannot go without notice that Appellee's response to this point noted by Appellants (see Appellants' Brief, p. 42), is to ignore it entirely.

Most importantly, as this Court made quite clear in *Kaiser Aetna v. United States*, ... U.S. ...., 100 S.Ct. 383 (1979), a partial taking may result from the deprivation of the owner's one significant "stick" in the "bundle" of rights that comprise property.

Thus, any doomsday cries of impending municipal bankruptcy (which have made their appearance here in spite of the self-evident fact that any fiscal catastrophe so dramatically foreshadowed perforce has to be self-inflicted), ought to be viewed with the healthy skepticism they deserve.

For if a finding of a *full* taking is in the offing on a given set of facts, that perforce means that the constitutional violation has been gross and its impact on the owner devastating. Here, as in other areas of constitutional law, it seems only fitting that the courts opt for supporting the Constitution, and not waste their sympathy on its egregious violators. Here, as elsewhere, there is no such thing as a free lunch; there is no intellectually or morally respectable reason why the public whose amenities are being bettered and whose resources are being enhanced by quite deliberate and determined acquistive actions of the government[37] (see Sax, *Takings and Police Power*, 74 Yale L. Jour 26, 62-63 (1964)), should not be called upon to provide recompense to those who are being impoverished as a result of such

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[37]It cannot go without noting that in the case at bench the events complained of came about only after an extended period of studies by renowned experts who determined that the subject property was indispensable to the City's "open space" resources and recommended its acquisition; indeed, until the notion of a "free lunch" beckoned, the City's conduct was avowedly acquisitory and included formal eminent doman proceedings. *This* governmental entity—advised by its counsel all along—knew exactly what it was doing; it was *acquiring* "open space" parklands to enhance its own resources. An allusion to this Court's observation quoted *supra*, at p. 19, seems quite appropriate.

asset transfer.[38] This Court has repeatedly so held: *Gerlach Live Stock Co. v. U.S.*, 339 U.S. 725, 752-753 (1950); Armstrong v. U.S., 364 U.S. 40, 49 (1960); *Berman v. Parker*, 348 U.S. 26, 36, (1954). To countenance a contrary view would be to sanction the "shorter cut" than permitted by the Constitution, that was enduringly deplored by Mr. Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

5.

THE CASE AT BENCH PROVIDES AN OPPORTUNITY TO STRIKE A BALANCE BETWEEN THE PUBLIC INTEREST AND ENVIRONMENTALIST ZEALOTRY.

Particularly in juxtaposition with the currently fashionable rhetoric exhorting environmental concerns as being in the public interest, it warrants reiteration of the bedrock principle on which this society rests, that the public interest encompasses those values that the framers sought to protect by inclusion in the fundamental guarantees of the Constitution. Thus, this case may provide this Court with an appropriate vehicle for striking a balance between environmental zealotry and the constitutionally endorsed *public* interest in securing to individual citizens a measure of pro-

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[38]The reciprocity theory on which zoning is sometimes justified (*i.e.*, that a proper land use pattern confers benefits on all members of the community) manifestly has no applicability to cases such as this where one or two members of the community are stripped of their property in order to improve the lot of their fellows. To call that "reciprocity" is to engage in a certain degree of distortion of the English language. To put it in legal terms, the *Euclid* zoning notion on which the idea of reciprocity rests has it that land uses in the community are allocated and thereby balanced; but it is absurd to claim to find "balance" in a system that denies all economic use to one citizen in order to enhance the uses of his neighbors' land.

tection against overreaching governmental confiscatory course of conduct.

Simply put, this isn't 1960 or even 1970; Rachel Carson's plea for the environment is no longer a lone cry in the wilderness. Today's world must confront the fact that environmentalists - far from the embattled little band of yore - tend to make their appearance armed to the teeth with potent laws and regulations enforced by a formidable array of governmental bureaucracies. In short, environmentalism has come of age and like any other force in society it must confront its obligations and ethical duties. It is time to strike a balance, and this Court may quite appropriately do so in this case.

This case illustrates how an ordinary citizen, who lawfully accumulated some property, can be simply destroyed by latter-day environmentalist Savonarolas who care only for their ideological goals, and who care naught for simple fairness and its reflection in the Constitution. Such citizens deserve and are entitled to that Constitution's protection.

Conclusion.

Much of Appellee's argument is digressive. It presses on the Court a red herring having to do with the supposed horrors of damages being payable for any slight governmental misstep. That is simply not the issue here. The present allegations (which must be taken as true, this being a dismissal following a general demurrer) are that the subject property has been deprived of *all* utility and value; *that* is what is before the Court. Similarly, the issue is whether just compensation remains an appropriate remedy in cases of full deprivation of an owner's property rights; not some fantasy involving involuntary fee purchases for minor missteps.

Whatever may be the full panoply of criteria that will satisfy the scholars as a complete matrix of inverse condemnation law governing non-physical takings, this case presents three important factors:

(a) it charges deprivation of *all* utility and value.

(b) it charges that the ostensible regulation is in fact an acquisitory device, and

(c) it charges that the owners have been deprived by the interaction of all city acts of their substantial property rights.

The criteria laid down by this Court in *Penn Central* and *Kaiser Aetna* are thus quite sufficient to permit Appellants a trial on the merits.

Appellants pray that the judgment below be reversed and the cause be remanded for trial.

Respectfully submitted,

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FOR ARGUMENT

Supreme Court, U.S.
FILED
APR 3 1980
MICHAEL RODAK, JR., CLERK

No. 79-602

In the Supreme Court of the United States

OCTOBER TERM, 1979

DONALD W. AGINS AND BONNIE G. AGINS,
APPELLANTS

v.

CITY OF TIBURON

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a zoning ordinance restricting development of appellants' property to no more than one single-family dwelling per acre constitutes a taking of property without just compensation in violation of the Fifth and Fourteenth Amendments.

2. Whether the Fifth and Fourteenth Amendments require that a state court afford a remedy in damages if plaintiffs allege and prove that a zoning ordinance constitutes an unconstitutional taking of their property, where declaratory relief and mandamus are available.

INTEREST OF THE UNITED STATES

This case concerns the validity of a municipal zoning ordinance enacted as part of a comprehensive land use plan to protect a part of the area's remaining open spaces from the encroachment of dense commercial and residential development. It is challenged as a taking under the Fifth and Fourteenth Amendments, and appellants seek to compel the payment of damages in what they style an action for inverse condemnation.

Should appellants prevail, regulatory measures in numerous federal programs, including programs dependent on the employment of traditional land use controls, could be subject to similar takings challenges. Moreover, in many federal environmental programs Congress has adopted a policy of encouraging state and local governments to enact the necessary regulatory programs, including traditional land use controls—in some cases expressly placing the responsibility for such enactments on these governments. See, *e.g.*, provisions of the Airport and Airway Development Act of 1970, 49 U.S.C. 1701 *et seq.*; the Clean Water Act, 33 U.S.C. 1288, and 33 U.S.C. (Supp. I) 1251(b), 1251(g); the Coastal Zone Management Act of 1972, 16 U.S.C. 1451(h); the Environmental Quality Improvement Act of 1970, 42 U.S.C. 4371; National Environmental Policy Act of 1969, 42 U.S.C. 4331(a); the National Historic Preservation Act of 1966, 16 U.S.C. 470; and the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6941-6949. In other areas, Congress offers financial

assistance and other encouragement to promote local land use planning. See, *e.g.*, provisions of the Demontration Cities and Metropolitan Development Act of 1966, 42 U.S.C. 3334; the National Flood Insurance Act of 1968, 42 U.S.C. 4102; the Housing and Community Development Act of 1974, 40 U.S.C. 461; and the Soil Conservation and Domestic Allotment Act, 16 U.S.C. 590c.

A holding by this Court that the ordinance at issue in this case is constitutionally infirm as applied to appellants might put in doubt the constitutionality of some of these federal and federally assisted programs; and a holding that the Constitution requires that a remedy in damages be made available to any plaintiff who proves that a land use law is invalid under the Takings Clause as applied to his property could exert a chilling effect on the good faith exercise of the police power, impede the public budgeting process, and threaten the solvency of many local governments that attempt to carry out land use policies of federal environmental programs.

STATEMENT

1. Appellants own five acres of unimproved land in the City of Tiburon, Marin County, California (A. 4). On June 28, 1973, in compliance with a state law requiring cities and counties to include "open space elements" in their general land use plans (Cal. Gov't Code § 65560 *et seq.* (West Supp. 1980)), the City enacted Ordinance No. 124 N.S., designating appellants' land as coming within an "RPD-1" zone, meaning that the land is restricted

to certain authorized uses, namely "(1) [o]ne-family dwellings[,] (2) [o]pen space uses [, and] (3) [a]ccessory buildings and accessory uses" (A. 5; J.S. App. 3, 30-32, 45-46).[1] Appellants' parcel was among more than 250 acres in the City (some 15% of its land area) designated RPD-1 by the ordinance (Tiburon zoning map, reprinted at C. Tr. 21M).[2] Under the ordinance, appellants are entitled to use their five acres of land for one single-family dwelling, and, on application, the City may approve construction of up to four additional single-family dwellings, for a total of five on five acres (J.S. App. 3, 31-36).[3]

On October 15, 1973, appellants filed a claim with the City demanding $2 million for the injury allegedly done to their property by passage of the ordinance (J.S. App. 3-4, 7, 21-23). The City rejected the claim (*id.* at 24). On December 4, 1973, six months after

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[1] Ordinance 124 N.S. specifies the areas to be placed into particular zoning categories; the specification of uses permitted for land zoned as RPD-1 appears in Ordinance No. 123 N.S., enacted the same day (J.S. App. 20-40).

[2] "C. Tr." refers to the Clerk's Transcript of the record on appeal from the Superior Court of California, County of Marin.

[3] It appears that, when appellants bought their land in 1968, the then-applicable zoning ordinance similarly allowed them to build only five homes on the five acres (Appendix C to the brief filed by the Conservation Foundation, *et al.* as amici curiae). Whether appellants are now permitted to build five dwellings or fewer, depends upon the particular architectural design contemplated and the results of the required environmental reviews. The ordinance provides standards that the City must consider to determine the appropriate maximum allowable density (J.S. App. 3, 32-36). Appellants have not applied to the City for a permit (*id.* at 3).

the challenged ordinance was enacted, the City filed a complaint in eminent domain to acquire appellants' property, but later abandoned the proceedings (J.S. App. 4; A. 9-10).

2. On June 16, 1975, appellants filed suit against the City in the Superior Court of California, County of Marin, alleging, in a first cause of action, a claim in inverse condemnation for two million dollars in damages, and requesting, in a second cause of action, declaratory relief, asserting that Ordinance No. 124 N.S. constituted a taking in violation of the Fifth and Fourteenth Amendments (A. 3-15). Appellants' complaint alleged generally that the ordinance "completely destroyed the value of [their] property for any purpose or use whatsoever" (A. 7). They also alleged, however, that the general area in which their property was situated is "the most desirable place to live in the State of California and [has] the highest land value per acre for suburban areas in the State of California" (A. 3). They further alleged that their particular parcel is ideal for residential development, having "magnificent views of the San Francisco Bay and the scenic surrounding areas" and "the highest market values of all lands within the city" (A. 4).

The City answered with a general demurrer to both claims (A. 25). The trial court sustained the demurrer as to the inverse condemnation claim without leave to amend and it sustained the demurrer to the claim for declaratory relief with leave to amend within 10 days (A. 26). Appellants declined to amend and appealed to the Court of Appeal for the First Appellate District, which affirmed the trial court's

dismissal of the claim for declaratory relief and reversed as to dismissal of the inverse condemnation claim (App. Br. 8).

3. On the City's appeal to the California Supreme Court, that court, one justice dissenting, vacated the decision of the Court of Appeal and affirmed the trial court's dismissal of both claims for relief (J.S. App. 1-24).

The court concluded that when a public agency has adopted a zoning ordinance that substantially limits use of landowners' property, the landowners may not recover damages on the theory of inverse condemnation; rather, they may challenge the constitutionality of the ordinance either through an action for declaratory relief or mandamus. The court reasoned that an invalid exercise of the police power could not be converted at the landowner's option into a valid exercise of the power of eminent domain, giving rise to a right to payment of just compensation (*id.* at 5). Recognizing that an exercise of the police power to promote the public health, safety, or welfare may amount to a "taking" if it would destroy substantially all of a landowner's use of the land in question, the court noted that the customary remedy was invalidation of the regulation for failure to provide compensation (*id.* at 7-8). It further concluded that if local governments that enacted land use laws determined by a court to have exceeded limits of the police power in that respect (and thus to constitute a "taking") were to be held liable in damages on a theory of inverse condemnation, this would deter

valid land use regulation, out of fear that a court might hold it to be a taking and require, in effect, that the government purchase land that it had intended only to regulate (*id.* at 10-12).

Second, the court held that, in any event, because the zoning restriction allowed appellants to build up to five dwellings on their property, its effect, as a matter of law, was not to deprive them of substantially all reasonable use of their land, and it was not, therefore, unconstitutional (J.S. App. 12-13). Finally, the court rejected appellants' assertion that the City's "precondemnation activities"—the authorization of studies recommending acquisition of appellants' land and the filing and subsequent abandonment of an eminent domain proceeding—"were so unreasonable as to provide a separate basis for an action in inverse condemnation" (*id.* at 13-14).

The dissenting justice asserted that appellants had alleged sufficient facts to make out their takings claim, that a damage remedy was constitutionally required where such claims were proven, and that without such a remedy available, government agencies would be encouraged to enact land use plans similar to the one at issue (*id.* at 16-24).

SUMMARY OF ARGUMENT

I.

Under principles set forth in this Court's decisions in *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), and *Penn Central Transportation Co.* v. *New York*

City, 438 U.S. 104 (1978), a land use regulation such as a zoning ordinance is not deemed a taking without just compensation under the Fifth Amendment where the regulation is not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare" (*Euclid* v. *Ambler Realty Co.*, *supra*, 272 U.S. at 395) and does not deprive the owner of every reasonable beneficial use of his property. Thus, the fact that such a regulation may produce a severe diminution in the value of property, or deprive the owner of certain profitable uses of that property, does not prove it to be an unconstitutional taking.

Under these principles, the particular factual allegations of the complaint in this case do not establish the unconstitutionality of the City's ordinance. Appellants do not seriously dispute the substantial relation of the ordinance to the public welfare, *i.e.*, the protection of remaining open space areas in the City from the encroachment of dense development. Their conclusory allegation that the ordinance, and the City's open space planning activities generally, have left their parcel without value for any use is contradicted by the terms of the ordinance, which permit construction of up to five single-family dwellings on the parcel, and by particular allegations in the complaint that the parcel has the highest market value of land in an area that itself includes the most valuable suburban land in the State and that the parcel is well suited to residential development. Accordingly, the California Supreme Court was correct in finding that the

ordinance was not a taking within the meaning of the Fifth Amendment and in affirming the trial court's dismissal of the complaint.

II.

Appellants contend that when a state court determines that a zoning ordinance has so exceeded the limits of the police power as to constitute an unconstitutional taking of property, the court is not free to limit the plaintiffs to declaratory relief and mandamus but must afford plaintiffs the right to recover damages on a theory of inverse condemnation. Their position rests on several flawed arguments.

First, they incorrectly argue that a legislature's enactment of a law that regulates uses of property in a manner ultimately deemed by a court to constitute a taking is the equivalent of an exercise of the power of eminent domain to acquire property. From this they conclude that a court may properly compel a government to purchase property it sought only to regulate, albeit in a manner deemed unconstitutional by the court. That proposition is unsupported by precedent. Instead, decisions of this Court on which appellants rely suggest a sensitivity to legislative choice in considering what remedies to give when a statute is found to be invalid under the Takings Clause. A legislature that enacts a zoning ordinance has made a clear choice: it has in effect decided to define property rights rather than to acquire them. If in the present case, contrary to our submission, the City has misjudged the degree to which it may validly

control the density of residential development without resorting to proceedings in eminent domain, it should not be found to have impliedly agreed to purchase property the uses of which it sought only to regulate.

Second, appellants incorrectly suggest that the remedies of declaratory relief and mandamus are inadequate as a matter of constitutional law. No allegations in their complaint support the claim that such relief would be inadequate. If the ordinance were struck down, the restrictions which they allege deprive them of all beneficial use of their property would be lifted; and mandamus would be available to compel the issuance of permits and the like were the City to seek in some way to evade compliance with the decision. In recognition of principles of federalism, this Court has indicated that only when relief offered by a state court for the protection of a federal right is wholly inadequate should a federal court interfere with the state court's remedial discretion. Even in cases brought in federal court against federal officials, this Court has not suggested that a remedy in damages is the sole adequate remedy for a constitutional violation; and there is no authority for the proposition that only a damages remedy provides adequate relief for unconstitutional restrictions on land use imposed by a zoning ordinance.

Third, appellants suggest that state and local governments would enjoy greater flexibility in their policy choices in land use planning if the inverse condemnation remedy were available to developers and others

who challenge land use regulations. In fact, just the opposite is the case. If such an ordinance is invalidated in whole or in part, the enacting body is free to enact an amended ordinance, proceed in eminent domain (if it possesses such powers), or abandon its regulation of the land uses concerned. Under appellants' scheme, a government would be compelled to purchase the property at issue. Compelled purchase not only restricts a government's options in land use planning, it may create budgetary problems that constrain decisions in other areas. And the mere threat of such a remedy may inhibit local governments from devising constitutional land use policies, for fear that a court may disagree with the judgment of corporation counsel on the constitutional validity of regulation. Such inhibitions may discourage the participation of state and local governments in federal environmental programs that depend on implementation through land use controls at the state and local level.

ARGUMENT

I. A ZONING ORDINANCE THAT IS DESIGNED IN PART TO PRESERVE OPEN SPACE FROM ENCROACHING DEVELOPMENT AND THAT RESTRICTS DEVELOPMENT OF LAND TO THE CONSTRUCTION OF NO MORE THAN ONE SINGLE-FAMILY DWELLING PER ACRE DOES NOT CONSTITUTE A TAKING OF PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS

A. A Zoning Ordinance Having a Substantial Relation to the Public Welfare Does Not Take a Landowner's Property in Violation of the Fifth and Fourteenth Amendments Where a Reasonable Beneficial Use of the Property is Permitted

In *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), this Court set out the principles applicable to a determination of the facial validity of a zoning ordinance attacked as a violation of the Takings Clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment. The specific allegation of the landowners in *Euclid* was that the very existence of the ordinance depressed the value of their property from $10,000 per acre to $2,500 per acre because it prohibited use of that property for the construction of industrial or commercial buildings and apartment houses (272 U.S. at 384-385). This diminution in the value of the property, they alleged, made the ordinance unconstitutional on the ground that it was both "unreasonable and confiscatory" (*id.* at 386).

The Court rejected the argument. It held, first, that the ordinance was a reasonable exercise of the police

power, the test being whether its provisions were not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare" (*id.* at 395). In reaching this conclusion the Court noted, *inter alia*, the desirability of maintaining "open spaces and attractive surroundings created by the residential character of [a] district" (*id.* at 394); and it found the justification for the many restrictions in the ordinance in the changing conditions of urban life (*id.* at 386-387):

> Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive.

Continuing its consideration of the reasonableness of the regulation, the Court next inquired into the injury alleged—the adverse effect on market value of the property allegedly resulting from the mere existence of the ordinance—and concluded that this also was insufficient to establish the unconstitutionality of the ordinance. *Id.* at 395-396.[4]

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[4] The Court noted that it did not have before it the question of specific damage resulting from the application of particular provisions of the ordinance to particular parcels of the owners' property. *Id.* at 397.

More recently, in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), this Court summarized principles applicable to "takings" claims generally and to claims that a particular law restricting land use is unconstitutional as applied to the property of the one alleging the taking.[5] There the Court discussed a number of factors of particular significance in evaluating taking claims; but the factors fall generally under two headings—the character of the government action and its impact on the particular claimant. *Id.* at 124-128.

As to the first, the Court stated (*id.* at 124) that a taking is much "more readily * * * found when the interference with property can be characterized as a physical invasion by government * * * than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." In instances of the former, not only is the interference direct and manifest, but frequently the government in its "enterprise capacity" acquires assets or otherwise benefits directly from the interference at the claimant's expense. 438 U.S. at 124, 128. See, *e.g.*, *United States* v. *Causby*, 328 U.S. 256, 262-263 n.7 (1946) (low overflights of military

[5] As we explain below (pages 19-20, *infra*), appellants in the present case are barred, by their failure to apply for a permit to build more than one house on their parcel, from attempting to prove that they would be unable to meet the requirements for permission to build the maximum of five permitted by the ordinance. In any event, as we show below, under the tests set out in *Penn Central, supra*, the ordinance would not be unconstitutional even if appellants were allowed to build only one single-family dwelling on their parcel.

planes not only "destroyed property"—by destroying its use as a chicken farm—but also "used part of it"); *Portsmouth Co.* v. *United States*, 260 U.S. 327 (1922) (target fire by military installation across private land). See also *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960) (no physical invasion, but government's exercise of an option under a ship construction contract held a taking where the government was "the direct, positive beneficiary" of the resulting destruction of materialmen's liens).

Where the asserted interference is "some public program" (*Penn Central, supra*, 438 U.S. at 124)—i.e., a regulation enacted pursuant to the police power—the Court adheres to the *Euclid* test. It inquires whether the regulation has as its objective a "permissible governmental goal" (*Penn Central, supra*, 438 U.S. at 129), and whether the restrictions it imposes are "substantially related to the promotion" of that objective (*id.* at 138).[6] Thus, the Court noted in *Penn Central* (*id.* at 125) that "in instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land use regulations that destroyed or adversely affected recognized real

[6] The initial two-stage inquiry may also be regarded as a substantive economic due process test. See, *e.g.*, *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978) (statute upheld prohibiting petroleum refiners from operating retail service stations in state); *Nebbia* v. *New York*, 291 U.S. 502 (1934) (convictions for selling milk below state-fixed price upheld).

property interests." It characterized zoning laws as the "classic example" of government action viewed as "permissible * * * even when prohibiting the most beneficial use of the property." *Ibid.* Significantly, the Court rejected the notion that to be lawful a restriction must prohibit some "noxious" use, rather than promote a public benefit (*id.* at 133-134 n.30).

In considering the second major set of factors—the impact on the property owner of the asserted governmental interference—the Court inquires whether the owner is left with any reasonable beneficial use of his property. *Penn Central, supra,* 438 U.S. at 135-138. The "reasonable use" inquiry is sometimes made difficult by the fact that property itself is not easily definable. Property may consist of a myriad of rights, powers, duties, privileges, and disabilities—sometimes linked to a tangible *res,* sometimes not. See generally Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning,* 23 Yale L.J. 16 (1913); Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning,* 26 Yale L.J. 710 (1917).[7]

[7] Theoretically rights in a tangible *res,* such as land, are not superior to rights in intangibles; but as Mr. Justice Holmes observed (*Block* v. *Hirsh,* 256 U.S. 135, 155 (1921)):

> The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. But the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay.

Decisions of this Court concerned with takings questions reflect this notion, for they speak of property as a "bundle of rights." *Kaiser Aetna* v. *United States,* No. 78-738 (Dec. 4, 1979), slip op. 12; *Andrus* v. *Allard,* No. 78-740 (Nov. 27, 1979), slip op. 14. See also *United States* v. *General Motors Corp.,* 323 U.S. 373, 377-378 (1945). At least where the exercise of the police power is concerned and "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Andrus* v. *Allard, supra,* slip op. 14. See also *United States* v. *Willow River Power Co.,* 324 U.S. 499, 502, 510 (1945). Thus, in *Penn Central,* the Court declined to focus only on the interference of the police power restriction with the use of the air rights above a building designated as a landmark but rather looked at "the parcel as a whole." 438 U.S. at 130-131. Whether a reasonable use of the parcel remained was the focus of the Court's inquiry. *Id.* at 131, 135-138. Similarly, in *Andrus* v. *Allard,* the Court did not find that an unconstitutional interference had occurred when government regulation prohibited sale of an owner's property, because, as it observed (slip op. 14), the property owners "retain[ed] the rights to possess and transport their property, and to donate or devise" it.[8]

[8] This Court's decision in *Kaiser Aetna* v. *United States, supra,* is not to the contrary. The court focused in that case on an interference with the " 'right to exclude' " and found that the federal government's exercise of its navigational servitude,

The upshot is that a mere diminution in the value of property cannot effect a taking. *Penn Central, supra,* 438 U.S. at 131. Thus, this Court has upheld regulations challenged as takings even where the economic impact on the owners is extremely severe. See, *e.g., Miller* v. *Schoene,* 276 U.S. 272 (1928), (cedar trees destroyed in order to prevent spread of disease to area's commercially valuable apple trees); *Euclid* v. *Ambler Realty Co., supra* (75% diminution in value caused by zoning law); *Hadacheck* v. *Sebastian,* 239 U.S. 394 (1915) (87% diminution in value). A law may prohibit the most profitable uses of property without constituting a taking. So long as any reasonable beneficial use remains, a law valid under the substantive due process test discussed above is not impermissible under the Takings Clause,

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which threatened the interference, would amount to an unconstitutional taking given the particular circumstances of that case; at least two factors, singly, or in combination, may have been critical to the holding. First, petitioners, at considerable expense, had developed a private pond into a marina, the use of which was offered to boat owners for a fee; and the government's attempt to prohibit petitioners from excluding the general public destroyed the *sole* use for which the marina was economically feasible. Second, the government had consented to the dredging and filling without indicating that any public access condition would be imposed—conduct that the Court characterized as leading to "the fruition of a number of expectancies" (slip op. 15). See also *Penn Central, supra,* 438 U.S. at 124 (emphasizing the significance of "distinct, investment-backed expectations").

despite the absence of any provision for compensation.[9]

Finally, in determining whether there is a remaining beneficial use, it is appropriate to consider the benefits that will accrue to the property owner under the law he is challenging as a taking. Even where a severe burden is imposed on an owner by restrictions on his use, possession, or disposition of property, there may be indirect benefits that will work to his profit in the long term, as the law's objectives come to fruition. See *Penn Central, supra,* 438 U.S. at 134-135, 137.

B. The City's Ordinance Does Not Effect a Taking of Appellants' Property

1. *Only facial validity of the ordinance is at issue*

At the outset, we should note that because appellants failed to apply for permission to build five single-family dwellings on their parcel—the maximum permissible under the ordinance—they are not entitled to attack the ordinance as it *might* specifically affect them should they make such an appli-

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[9] Circumstances may exist, however, in which even what the owner contends is the sole reasonable beneficial use (because the only profitable use) of property may validly be prohibited without paying compensation. For example, the owner may have no reasonable expectation of using the property in that way because of existing regulatory requirements. See also *United States* v. *Central Eureka Mining Co.,* 357 U.S. 155 (1958) (upholding prohibition, imposed pursuant to the war power, on operation of gold mines).

cation.[10] Under California law, this failure to exhaust administrative remedies restricts them to an attack on the ordinance as facially invalid. See, *e.g.*, *Pan Pacific Properties, Inc.* v. *County of Santa Cruz*, 81 Cal. App. 3d 244, 249-251, 146 Cal. Rptr. 428, 431-433 (1978); *Igna* v. *City of Baldwin Park*, 9 Cal. App. 3d 909, 914-915, 88 Cal. Rptr. 581, 585 (1970). Thus appellants are not entitled to a trial to inquire into how the planning requirements and the standards of the ordinance might affect them. It must be assumed, for purposes of this appeal, that they may build five single-family dwellings and accessory buildings on their parcel.

In any event, under the principles discussed above, it is clear that the enforcement of the ordinance at issue here, which, in the interest of sound municipal land use planning, imposes restrictions on the development of certain open space areas, does not effect a taking of appellants' property without just compensation, even assuming they are not able to build the permitted maximum of five dwellings on their parcel. It is virtually undisputed that the ordinance promotes the public welfare; and despite certain conclusory allegations in their complaint, it seems evident from the specific factual allegations that appellants

[10] Appellants' complaint expressly challenged only the ordinance (No. 124 N.S.) that designates their parcel RPD-1. That ordinance of course, incorporates by reference the ordinance (No. 123 N.S.) that specifies permissible uses for RPD-1 land (see page 4, note 1, *supra*); for simplicity's sake, we shall follow appellants and the California Supreme Court in referring to "the ordinance."

will retain not only a reasonable—but a profitable—use of their property, whatever their success in meeting the planning requirements for building more than one single-family dwelling on the parcel.

2. *The ordinance promotes the public interest in sound land use planning*

Appellants did not, in the court below, dispute the propriety of the objective of the City's ordinance, nor do they seriously do so here.[11] Indeed, since they seek

[11] Appellants assert that the City "is already blessed with ample environmental resources" (App. Br. 40), and they refer pejoratively at one point to "community environmentalist zealots" (App. Br. 42); but in their only discussion of the substantive due process test, which is part of the "takings" inquiry, they notably fail to deny that the restrictions imposed by the ordinance lack a substantial relation to the general welfare (App. Br. 25-26). Instead, they complain that there was no finding by a state tribunal on this question. But such a finding was implicit in the California Supreme Court's ultimate conclusion that the ordinance was constitutionally valid; since appellants did not contend before that court that the objective of preserving open space was not a permissible goal, there was no reason for the Court to discuss the point in detail. Appellants' discussion of this point in their brief in this Court (App. Br. 25-26) confuses the question whether a law has a substantial relation to the public welfare with the quite different question whether it leaves a particular property owner with no beneficial use of his property.

Appellants' suggestion (App. Br. 27-29) that the ordinance was enacted—and the open space plans of consultants published—in order to "facilitate" the City's "acquisition" of the property displays a curious ambiguity in the use of the term "acquisition," and—when analyzed—states no genuine separate claim against the City at all. If appellants are suggesting that the City enacted the ordinance in order to reduce the

to compel the equivalent of an eminent domain action by requiring the City to purchase their land (see Point II, *infra*), it would be inconsistent for them to contend that restricting the land to the uses specified by the ordinance fails to promote a valid public purpose.

Nevertheless, should appellants belatedly undertake to dispute the matter, they would face compelling arguments to the contrary. As this Court has observed, "States and cities may enact land use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city." *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 129 (1978) (citations omitted). The open space concerns of the City of Tiburon fall squarely within these goals. In re-

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value of their parcel so that it could be purchased cheaply in eminent domain proceedings, they make nonsense of their central argument that the City is wrongfully *refusing* to acquire their property through such proceedings and must be forced to do so pursuant to the grant of an "inverse condemnation" remedy. If they are contending, instead, that the ordinance is a devious means of avoiding the necessity of paying anything for the land—*i.e.*, of avoiding eminent domain proceedings—they are merely stating their main argument (that this kind of zoning is itself a form of "acquisition") in somewhat different terms. As we explained elsewhere (pages 14-15, *supra*, page 24, *infra*), this second argument reflects a misreading of this Court's decisions regarding takings challenges. In any event, the argument does not assume that preservation of open space areas is an impermissible governmental goal.

We note also that appellants have not alleged that the ordinance was motivated by racial or otherwise invidious discrimination or that it violates any civil rights statutes.

stricting a modicum of land to open space uses and to single-family dwellings, the ordinance is akin to a number of zoning ordinances upheld by this Court. See *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 9 (1974) (zoning power can legitimately be used to create a "quiet place where yards are wide, people few * * * and the blessings of quiet seclusion and clean air make the area a sanctuary for people"); *Gorieb* v. *Fox*, 274 U.S. 603, 608 (1927) (sustaining propriety of setback regulations that by their terms require open space areas on land); *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 394 (1926) (excluding apartment houses from a residential district is a permissible restriction).[12]

The ordinance at issue in this case was, moreover, enacted in response to a state law requiring cities and counties to develop local open-space plans in order to discourage "premature and unnecessary conversion of open-space land to urban uses" (Cal. Gov't Code § 65561(b) (West Supp. 1980)). Because the restrictions in the ordinance are not solely applicable to the property of any one owner, but are part of a comprehensive plan that seeks to achieve balanced land use in the community, the ordinance is not objectionable as an instance of spot-zoning. See *Penn Central*, *supra*, 438 U.S. at 135 n.32. See generally

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[12] One acre zoning limitations are almost uniformly upheld by courts in the major zoning states. See generally, 2 N. Williams, *American Planning Law—Land Use and the Police Power*, ch. 39 (1974); R. Anderson, *American Law of Zoning* §§ 7.20, 9.60 (1976).

Haar, "*In Accordance with a Comprehensive Plan*," 68 Harv. L. Rev. 1155 (1955).

Finally, because the ordinance is simply a variant of density regulation, a traditional use of the zoning power, it is incorrect to argue, as appellants do (App. Br. 26-27), that the ordinance is an instance of governmental "acquisition" of assets belonging to appellants and others whose land has been zoned RPD-1, accomplished "in the guise of regulation." This Court's discussion in *Penn Central, supra*, of the sorts of "government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions," which "have often been held to constitute 'takings'" (438 U.S. at 128), makes it clear that those are cases in which the government itself is directly invading or otherwise using the property. In the present case, as shown, the City has merely acted to prevent appellants and others from developing their land in a manner that would defeat sound urban planning goals. Such action is a classic use of the police power (see *Penn Central, supra*, 438 U.S. at 125) that benefits not the government acting in its enterprise capacity, but the public as a whole.

In sum, it cannot seriously be maintained that the ordinance at issue here is not substantially related to the promotion of the general welfare. Given the severely limited scrutiny of this Court into such questions (see *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 595-596 (1962)), leaving the issue essentially undisputed was clearly appellants' wisest course.

As they have asserted, when pursuing another point (App. Br. 40-41): "[S]ound time-tested reasons of public policy respectful of the doctrine of separation of powers, counsel against the judiciary's too-ready constitutional intervention in peculiarly local, often political, land use decisions on an ongoing daily basis." We would qualify that statement only by noting that in recent decades the judiciary has, on the whole, avoided this sort of intervention, as the trial court and the California Supreme Court have done in the present case.

3. *The ordinance does not leave appellants without a reasonable beneficial use of their land*

In their complaint, appellants alleged (A. 7) that the ordinance "has completely destroyed the value of [their] property for any purpose or use whatsoever * * *." Under California demurrer practice, as is the case generally, no court is bound to accept such a conclusory allegation as true, particularly where it is contradicted by the terms of the ordinance put in issue and by other specific factual allegations of the complaint. See *Dale* v. *City of Mountain View*, 55 Cal. App. 3d 101, 105, 127 Cal. Rptr. 520, 522-523 (1976); *Hecton* v. *People ex rel. Department of Transportation*, 58 Cal. App. 3d 653, 130 Cal. Rptr. 230 (1976); Cal. Evid. Code § 452 (West 1966). See generally, *Pierce Oil Corp.* v. *City of Hope*, 248 U.S. 498, 500 (1919); 2A *Moore's Federal Practice* ¶12.08 & n.4 (2d ed. 1979) (in a motion to dismiss, as in a demurrer, "conclusions of law or unwarranted deductions of fact are not admitted").

Appellants' allegation that their land has been rendered worthless by the ordinance is squarely contradicted by the terms of the ordinance, which permits the construction of one single-family dwelling as of right and up to five such dwellings where planning requirements are met, and by the specific allegation elsewhere in the complaint (A. 4) that residential development is the highest and best use of the land. Appellants' further allegations that land in the general area has "the highest land value per acre for suburban areas in the State of California" (A. 3) and that their parcel in particular has "the highest market value[] of all lands within the city limits" (A. 4) make it evident that the construction and sale of the number of dwellings permitted by the ordinance would hardly be an unprofitable use of the land.

It is, moreover, noteworthy that one of the factors described by the complaint as contributing to the value of appellants' parcel is the existence of "magnificent views of San Francisco Bay and the scenic surrounding areas" (A. 4). As the City zoning map makes clear (C. Tr. 21M), the continued existence of some of those "scenic surrounding areas" is made possible by the very ordinance that appellants attack. Should the ordinance be struck down and development proceed apace, the value of appellants' land would decrease accordingly, if the significance of the scenic views is to be accepted as alleged in the complaint. It is not surprising, then, that the thrust of appellants' argument is not that the ordinance should

be struck down, but that the City should be compelled to buy their land at the value it enjoys as property surrounded by landscape uncluttered by structures built for the profit of other property owners. The ordinance at issue here is, in sum, an excellent example of a regulation that "applies over a broad cross section of land and thereby 'secure[s] an average reciprocity of advantage." *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 147 (1978), quoting *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922).

Moreover, it may also be noted that the complaint nowhere alleges that, at the time appellants purchased the parcel in question, it was zoned for a residential dwelling density significantly different from the maximum density allowed under the ordinance here challenged. If, for example, the parcel had previously been zoned for one single-family dwelling and associated buildings per acre, then the only loss appellants could allege would be loss of the right to build at that density without meeting special planning requirements. (See Appendix C to brief amici curiae of the Conservation Foundation, *et al.*) The failure to make any such allegation in the complaint represents a serious deficiency, since appellants may not properly be found to have been deprived of property rights they did not possess before the challenged ordinance was enacted.

In sum, appellants' complaint, read in its entirety, makes none of the factual allegations that, under relevant decisions of this Court, might be indicative

of a taking without just compensation within the meaning of the Fifth Amendment. The California Supreme Court thus properly affirmed the dismissal of the complaint on the City's demurrer; and, because the only other distinct issue raised by appellants here is a question of remedy that this Court need not reach if it finds that the ordinance does not constitute a taking, the Court may find it appropriate to dismiss the appeal for want of a substantial federal question.

II. THE FIFTH AND FOURTEENTH AMENDMENTS DO NOT REQUIRE THAT A STATE COURT AFFORD A REMEDY IN DAMAGES IF PLAINTIFFS ALLEGE AND PROVE THAT A ZONING ORDINANCE CONSTITUTES AN UNCONSTITUTIONAL TAKING OF THEIR PROPERTY, WHERE THE REMEDIES OF DECLARATORY RELIEF AND MANDAMUS ARE AVAILABLE

A. Introduction

Appellants contend that when a state court determines that a zoning ordinance has so exceeded the limits of the police power as to constitute an unconstitutional taking of property, the court is not free to limit the plaintiffs to declaratory relief and mandamus but must afford them the right to recover damages on a theory of inverse condemnation. Appellants' position rests on the arguments (1) that the enactment of a law that is intended to regulate uses of property, but that is deemed invalid by a court because its operation would destroy all beneficial use of affected property, is the equivalent of an authorized exercise of the power of eminent domain (App.

Br. 15-21); (2) that the equitable remedies available in the California courts for claims like those made in the present case are inadequate (App. Br. 44-55); and (3) that policy considerations militate in favor of requiring the California courts to afford plaintiffs in appellants' position a damages remedy (App. Br. 41-43). Appellants further assert (App. Br. 31-41) that decisions of this Court support their position that they are constitutionally entitled to damages in "inverse condemnation" once they have shown a regulatory measure to be invalid under the Takings Clause.

As we show below, however, an invalid police power measure regulating uses of private property cannot properly be equated with an exercise of the power of eminent domain; contrary to appellants' contention, the decisions of this Court do not establish the propriety of that equation. As we further show, this case fits within the general rule that state courts need not offer any particular remedy for violation of a federal right, so long as the remedies they afford are adequate; and the remedies available in the California courts in suits like the present case *are* constitutionally adequate. Finally, even though this Court perhaps need not decide which remedies, as a matter of policy, would best serve the interests of local governments as parties in state court actions, it seems evident that it is distinctly *not* in the interest of local governments to permit landowners who successfully challenge land use regulations as takings to compel the purchase of their lands by governing bodies that have chosen only to regulate land uses.

We note at the outset, however, that it is not entirely clear that no form of damages is ever available in the California courts to those challenging regulatory measures as takings. In the present case, the California Supreme Court stated only (J.S. App. 1) that when a landowner establishes that a zoning ordinance is constitutionally infirm because it "substantially limits use of his property" he "may not recover damages on the theory of inverse condemnation." [13] In an earlier decision, *HFH, Ltd.* v. *Superior Court of Los Angeles County*, 15 Cal. 3d 508, 517-520, 542 P. 2d 237, 244-245, 125 Cal. Rptr. 365, 372-373 (1975), cert. denied, 425 U.S. 904 (1976), in which the California Supreme Court expressly considered the question whether "*interim* damages" (*i.e.*, damages to compensate for economic losses suffered before a zoning ordinance is invalidated by a court) might be awarded to plaintiffs who showed a reduction in the market value of property induced by zoning, the Court concluded that such damages would not be available on that showing because a diminution in value, alone, does not prove a taking; but the court did not address the question whether such a damage claim might be added to a "mandate action" where facts showing a taking were established. 15 Cal. 3d at 519-520, 542 P. 2d at 245, 125 Cal. Rptr. at 373. See also 15 Cal. 3d at 516 n.14, 542 P. 2d at 243 n.14,

[13] Because the California Supreme Court found the ordinance at issue here valid, its discussion of the remedy question is technically dictum rather than holding, albeit well considered dictum.

125 Cal. Rptr. at 373 n.14.[14] In addition, the California Supreme Court has not necessarily foreclosed the possibility of a damages remedy where landowners sue in a state court under 42 U.S.C. 1983, alleging that a zoning ordinance deprives them of their constitutionally protected property rights under color of state law. The California Supreme Court has held that state courts must entertain Section 1983 actions (*Brown* v. *Pitchess*, 13 Cal. 3d 518, 531 P. 2d 772, 119 Cal. Rptr. 204 (1975)), and the court has not had occasion to decide what remedies are available where claims similar to those brought by appellants in the present case are raised under that federal statute.[15] Of course, it is likely that the California court

[14] In *HFH, Ltd.*, the California Supreme Court treats the issue of the availability of damages based on an inverse condemnation theory as separate from the issue of the availability of interim damages as part of a writ of mandate (see Cal. Civ. Proc. Code § 1095 (West Cum. Supp. 1980)). In discussing the latter issue, the California court did suggest that the state tort immunity statute (Cal. Gov't Code § 818.2 (West 1966)) would preclude liability for interim damages based on a claim analogous to state tort law, but avoided addressing the question of the propriety of liability for interim damages (such as holding costs) if such a claim was of constitutional dimension. Courts in California have given no indication that the state tort immunity statute would preclude a damage claim as part of a writ of mandate if it ever was constitutionally required. See *Graham* v. *City of Biggs*, 96 Cal. App. 3d 252, 157 Cal. Rptr. 761 (Ct. App. 1979) (state tort immunity statute inapplicable to action brought under Section 1983); *Rossiter* v. *Benoit*, 88 Cal. App. 3d 706, 152 Cal. Rptr. 65 (1979) (requirements of state tort claims inapplicable to Section 1983 claim).

[15] In any event, whether a damage action is based on Section 1983 or directly on the Constitution, it is possible that the City

would conclude that at least the "inverse condemnation" damages remedy is unavailable there for the same reasons it found it unavailable in the present case. See *Jacobson* v. *Tahoe Regional Planning Agency*, 474 F. Supp. 901 (D. Nev. 1979) (federal court holding that "damages for inverse condemnation" are unavailable in challenge to land use law under 42 U.S.C. 1983).

In these circumstances, this Court may deem it premature to decide now whether a damages remedy must, as a matter of federal constitutional law, be made available to those challenging land use regulations as takings in state courts. See *Phyle* v. *Duffy*, 334 U.S. 431 (1948).

B. A Zoning Ordinance Deemed Invalid as a Taking of Property without Compensation is Not the Equivalent of an Exercise of the Power of Eminent Domain

Appellants' claim of entitlement to damages in "inverse condemnation" appears to be essentially a claim "based on the right to recover just compensation for property taken by [the City] for public use in the exercise of its power of eminent domain" (*Jacobs* v. *United States*, 290 U.S. 13, 16 (1933)). This Court

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would enjoy immunity either under state or federal immunity law. This Court has decided neither the extent, if any, to which state law immunity could bar a federal constitutional claim (*see Ferri* v. *Ackerman*, No. 78-5981 (Dec. 4, 1979), slip op. 5 n.13; *Martinez* v. *California*, No. 78-1268 (Jan. 15, 1980), slip op. 7 n.11) nor the scope of any qualified immunity the City may enjoy under federal law for any good faith enactment of a regulation (see page 44, note 17, *supra*).

has recognized two ways in which a government, the United States, for example, may exercise that power (*United States* v. *Dow*, 357 U.S. 17, 21 (1958)):

> Broadly speaking, the United States may take property pursuant to its power of eminent domain in one of two ways: it can enter into physical possession of property without authority of a court order; or it can institute condemnation proceedings under various Acts of Congress providing authority for such takings. Under the first method—physical seizure—no condemnation proceedings are instituted, and the property owner is provided a remedy under the Tucker Act. 28 U.S.C. §§ 1346(a)(2) and 1491, to recover just compensation. See *Hurley* v. *Kincaid*, 285 U.S. 95, 104. Under the second procedure the Government may either employ statutes which require it to pay over the judicially determined compensation before it can enter upon the land, * * * or proceed under other statutes which enable it to take immediate possession upon order of court before the amount of just compensation has been ascertained.

See also *United States* v. *Clarke*, No. 78-1693 (Mar. 18, 1980), slip op. 2-3; *United States* v. *Dickinson*, 331 U.S. 745, 747-748, 749 (1947). Appellants are proposing a third way in which the eminent domain power may be exercised: the enactment of a regulatory measure that is ultimately held by a court to be unconstitutional because, if enforced, it will deprive a landowner of any reasonable beneficial use of his property without compensating him for the deprivation. Appellants further propose (App. Br. 9) that

such an enactment gives the affected property owners a "cause of action" in "inverse condemnation."

Appellants' argument has two basic fallacies. First, their use of the term "inverse condemnation" confuses their cause of action—*i.e.*, a claim that the City has violated their rights under the Fifth and Fourteenth Amendment by depriving them of substantially all beneficial use of their property without compensation —with the remedy they seek—*i.e.*, money damages. The two are not the same: the cause of action may exist without regard to what relief is requested or granted. See *Davis* v. *Passman*, 442 U.S. 228, 239-240 & n.18 (1979). Second, appellants overlook a vital distinction between the enactment of a law regulating the uses of property and the two types of government action described in *United States* v. *Dow*, *supra*. It is logical to speak of "the *choice* of the condemning authority to take property by physical invasion" or "by a formal condemnation action" (*United States* v. *Clarke*, *supra*, slip op. 5 (emphasis supplied)) and to award compensation for the property thus taken. In the former case, the government has appropriated property in a manner that precludes its return, giving rise to an implied promise to pay if the appropriation of property is authorized by a valid statute (see *Dugan* v. *Rank*, 372 U.S. 609, 619-623 (1963); *Hooe* v. *United States*, 218 U.S. 322, (1910)). In the latter, of course, the government has expressly announced its intention to pay by filing the proceeding.

Where a legislative body has enacted a regulatory measure such as a zoning ordinance, however, it has

in effect announced a decision to define property rights rather than to acquire them. A government may, up to a point, validly "cut down" property rights without paying where the restriction on such rights is substantially related to the public welfare. *Block* v. *Hirsh*, 256 U.S. 135, 155 (1921). When the government cuts them down unreasonably, one may call the result a taking of property; but it is unreasonable to speak of the government's "choice" to acquire the property or its implied promise to pay compensation. Instead, when a court determines that a regulatory measure is invalid as a "taking," a government is then faced with a different choice: it may continue to restrict the rights and pay for them, or it may forego restricting the rights.

Appellants seek to present their position as one that offers a government flexibility and minimal intrusion by the judiciary (App. Br. 36-43), but the effect of recognizing their claim of constitutional entitlement to this damages remedy is in fact to deprive a government of that choice. Invalidation of the regulation would leave a government with the option of filing appropriate condemnation proceedings, reenacting the measure with a compensation provision, or abandoning the effort to restrict the rights. Appellants would have courts disregard the government's choice and force it to purchase the affected property.

The decisions of the Court principally relied on by appellants fail to support their position. As appellants freely concede (App. Br. 31-34), in most of the decisions of this Court concerned with regulatory measures challenged as takings, injunctive relief

rather than money damages had been sought, and in none of the cases has monetary relief been awarded. The cases in which damages have been awarded are, with one exception discussed below (page 37), physical seizure cases. Moreover, several of those decisions contain language indicative of this Court's sensitivity to the question of a government's choice. *Dugan* v. *Rank*, *supra*, *Fresno* v. *California*, 372 U.S. 627 (1963), and *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950), all involved the actual diversion of water from the lands of private owners; and *Hurley* v. *Kincaid*, 285 U.S. 95 (1932), concerned a claim that plaintiff's lands would be flooded as a result of the construction of a federal floodway project. Even though *Gerlach*, like the others, was a case of taking by seizure, the Court carefully avoided the question of any constitutional entitlement to damages and found instead that Congress intended to pay for the state-defined water rights involved. As the Court explained (339 U.S. at 739): "Congress realistically elected to treat [the dam construction] as a reclamation project[,]" "to recognize any state-created rights and to take them under the power of eminent domain."

In *Hurley* v. *Kincaid*, *supra*, the Court denied the plaintiff's request for an injunction against construction of the floodway, but held that Congress had, in the Tucker Act, 28 U.S.C. 1346(a) and 1491, provided a remedy in damages should construction of the project go forward as authorized. The Court denied the injunction request in part because it would give plaintiff relief *before* any injury had been done (285 U.S. at 104); thus, even though plaintiff had alleged

that the very existence of the statute authorizing the project had placed a "cloud upon [his] title" and "materially affected and impaired the value thereof" (285 U.S. at 101 n.1), the Court found no entitlement to a remedy until the government had cast the die by commencing the project.

In the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), the Court was not dealing with a physical seizure, but in holding that the property owners concerned would be entitled to a remedy in damages should the statute in operation deprive them of full compensation for the property rights they were required to surrender, the Court was careful to determine that the granting of such a remedy would not be contrary to congressional intent. It satisfied itself that the Tucker Act remedy had not been withdrawn by Congress when enacting the Rail Reorganization Act (419 U.S. at 125-136, 148); and it further noted, in connection with both categories of takings alleged (*id.* at 129, 148), that the legislative history of the Rail Act indicated that Congress had *intended* to provide the minimum amount of compensation required for the act to be constitutionally valid. The Court did not hold that Congress could not constitutionally have withdrawn the Tucker Act and remitted the property owners to equitable remedies.

In the present case, the California Supreme Court has determined (J.S. App. 1) that state law provides no money damages "on the theory of inverse condemnation," and that conclusion is binding on this Court. *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590

(1875). The ordinance in question, by its nature, indicates an intent on the part of the City to avoid reliance on the power of eminent domain; it was, moreover, enacted in response to a state statute that expressly declines to authorize a city or county to adopt an "open-space zoning ordinance in a manner" that would constitute a taking of property without compensation, (see Cal. Gov't Code § 65912 (West Supp. 1980)); accordingly, the City must have intended to avoid imposing any burdens on property owners that would give rise to compensation claims such as that made by appellants here. As we have argued in Point I, we think it clear that the ordinance is a reasonable exercise of the police power and does not constitute a taking; but if the City has misjudged the degree to which it may validly control the density of residential development without having to resort to proceedings under eminent domain, it should surely not be found to have impliedly agreed to purchase property the uses of which it sought only to regulate.

C. The Equitable Remedies Available in the California Courts are Adequate Remedies for Claims that a Zoning Ordinance Deprives a Landowner of Substantially All Beneficial Use of his Property

Appellants also suggest (App. Br. 44-45) that they are constitutionally entitled to a damages remedy because invalidation of the ordinance, if it were found to constitute a taking, would be an inadequate remedy for the constitutional violation. The argument represents at least implicit recognition of principles of federalism affording a state court broad discretion

in fashioning remedies for violations of federal rights, so long as the state court affords an adequate remedy. See generally Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1118 (1969); Hill, *The Bill of Rights and the Supervisory Power*, 69 Colum. L. Rev. 181, 181-187, 191-193 (1969); Note, *State Remedies for Federally-Created Rights*, 47 Minn. L. Rev. 815, 830-834 (1963). Thus, this Court has interfered with a state court's choice of remedy for violation of a federal right only where the sole remedy offered in the state courts is wholly inadequate, in effect denying any relief for the violation. *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239, 247 (1931); *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 682 (1930); *Ward* v. *Board of County Comm'rs*, 253 U.S. 17 (1920); *Poindexter* v. *Greenhow* [*The Virginia Coupon Cases*], 114 U.S. 270, 303 (1885). See also *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 237-242 & n.45 (1977) (discussing adequate remedies for constitutional violation without directing state court to adopt one in particular); *Miranda* v. *Arizona*, 384 U.S. 436, 467 (1966) (states free to develop adequate safeguards, other than that devised by the Court, to protect the privilege against self-incrimination during custodial interrogation); *Mapp* v. *Ohio*, 367 U.S. 643, 651-653 (1961) (exclusionary rule applied to use in state court proceedings of evidence seized in violation of the Fourth Amendment because other remedies had provided futile). Indeed, the fact that a state *offers* an adequate remedy amounts to an adequate state

ground for a decision even if the party seeking review in this Court was not accorded the remedy because he failed to apply for it. *Phyle* v. *Duffy*, 334 U.S. 431 (1948); *Woods* v. *Nierstheimer*, 328 U.S. 211, 214, 216 (1946); *Mellon* v. *McCafferty*, 239 U.S. 134 (1915).

Nothing in this Court's decisions suggests that the Constitution requires that a damages remedy be made available to those challenging zoning ordinances as takings. Indeed, this Court has moved with caution even in determining whether a damages remedy is *authorized* in suits, based directly on the Constitution, that are brought in federal courts against federal officials. Thus, it held in *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 396 (1971), that damages were an available remedy for a particular type of Fourth Amendment violation where there were "no special factors counselling hesitation in the absence of affirmative action by Congress." And in *Davis* v. *Passman*, *supra*, this Court found damages to be an appropriate remedy for a particular equal protection claim under the Due Process Clause of the Fifth Amendment where "there are available no other alternative forms of judicial relief" (442 U.S. at 245); but, as the Court noted (*id.* at 248), "were Congress to create equally effective alternative remedies, the need for damages relief might be obviated." Because, as we have shown above (pages 34-37), a suit challenging a regulatory measure such as a zoning ordinance is distinguishable from the physical seizure cases, in which " 'the self-executing character of the constitutional provision with respect to

compensation' " (*United States* v. *Clarke*, *supra*, slip op. 4) warrants a damages remedy, there is no reason for the Court to abandon its cautious approach respecting remedies in the present case.

The facts alleged in the appellants' complaint in no way suggest that, if the ordinance at issue here is determined to be a taking, the remedies of declaratory relief and mandamus would be inadequate as a matter of constitutional law.[16] A declaration that the ordinance is invalid would relieve appellants of the restrictions they contend have rendered their property worthless, and were the City, for example, to impose permit requirements that amounted to an attempt to evade the court's decision, the mandamus remedy would permit a court to compel issuance of the permits. Appellants' contention (App. Br. 44, 51) that the remedy is inadequate because the California courts refuse to give it, is not a criticism of the adequacy of the remedy, but an attack on the merits of decisions finding that particular ordinances do not amount to takings.

Appellants' suggestion (App. Br. 41-42) that the equitable relief specified by the California Supreme Court would, in any event, be inadequate to remedy

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[16] It is perhaps for this reason that, in speaking of the alleged inadequacy of the remedy, appellants (App. Br. 44-53) dwell primarily on anecdotal accounts of cases involving other landowners and other laws and do not explain precisely why an order invalidating the ordinance at issue here would be inadequate to remedy any injury of constitutional dimensions they might be found to suffer, given the allegations of their complaint.

damage for any "temporary or partial taking" also finds no support in the allegations of their complaint. They allege that the ordinance and the publication of proposed City land use plans reduced the market value of their land to the point of worthlessness because it could not be developed or otherwise used (A. 7, 13). As we have shown (page 26, *supra*), other allegations of the complaint contradict that assertion; but, even assuming it were true, invalidation of the restrictions on development would remove the essential source of that injury. As we have also shown (pages 13, 18), diminution in market value is not an injury of constitutional dimensions, so compensation on that account would not be justified; and mere hopes of earning profits are similarly noncompensable. See *Mosca* v. *United States*, 417 F.2d 1382, 1386 (Ct. Cl. 1969); *Eastport Steamship Corp.* v. *United States*, 372 F. 2d 1002, 1010 (Ct. Cl. 1967) (Davis, J.). In any event, appellants did not contend before the California Supreme Court that they had alleged facts entitling them to such damages, and when they first raised the subject at all, in their petition for rehearing (App. Pet. Reh. 25-26), they discussed it only as an abstract proposition; accordingly the court below had no occasion to address the question (see pages 30-32, *supra*).

D. Public Policy Considerations Support the California Supreme Court's Determination of the Remedy Issue

If this Court reaches the choice of remedy issue and concludes, in agreement with our submission, that the choice made by the California Supreme Court

offends no federal constitutional provision, the Court's task is at an end. For the wisdom of the policy underlying such a state court determination is uniquely for that court system to decide. See Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954). Cf. *Miranda* v. *Arizona*, 384 U.S. 436, 467 (1966).

In any event, the California Supreme Court was surely correct in concluding (J.S. App. 9) that "policy considerations" favor "the view that inverse condemnation is an inappropriate and undesirable remedy in cases in which unconstitutional regulation is alleged." As we have already remarked, acceptance of the "inverse condemnation" remedy urged by appellants would, contrary to their contentions (App. Br. 41-44), interfere with the freedom of a legislative body to decide whether and to what extent it wishes to effectuate its land use policies through the exercise of the power of eminent domain. If an ordinance is invalidated in whole or in part, the enacting body is free to enact an amended ordinance, proceed in eminent domain, or abandon its regulation of the land uses concerned. Compelled purchase not only restricts a government's options as to land use policy; it may create immediate budgetary problems that affect the government's ability to act in other areas. *Jacobson* v. *Tahoe Regional Planning Agency*, 474 F. Supp. 901, 903 (D. Nev. 1979); Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 Stan. L. Rev. 1439, 1450-1451 (1974). Of course, if a government

prefers that its land use scheme not suffer disruptions through the invalidation remedy, it can draft its legislation with a view to providing for compensation where a court deems that essential to the constitutionality of the law. See F. Bosselman, D. Callies & J. Banta, *The Taking Issue* 303 (1973) (describing Dayton, Ohio, scheme for providing compensation in cases in which land use restrictions as applied to particular properties are deemed to constitute a taking).

Even local governments that are not compelled to purchase land contrary to legislative choice may suffer if the inverse condemnation remedy sought by appellants is made available in suits challenging zoning ordinances. As the California Supreme Court has recognized (J.S. App. 10-11), the very existence of the remedy may intimidate local governments in their community planning functions. *Jacobson* v. *Tahoe Regional Planning Agency*, *supra*, 474 F. Supp. at 903; Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 Stan. L. Rev. 1439, 1450 (1974); Note, *Eldridge* v. *City of Palo Alto: Aberration or New Direction in Land Use Law?*, 28 Hastings L.J. 1569, 1597 (1977).[17]

[17] Similar considerations have led some courts to recognize a good faith immunity defense for cities and counties sued for governmental actions under 42 U.S.C. 1983. *Owen* v. *City of Independence*, 589 F.2d 335 (8th Cir. 1978), cert. granted, No. 78-1779 (Oct. 1, 1979) (argued Jan. 8, 1980); *Sala* v. *County of Suffolk*, 604 F.2d 207 (2d Cir. 1979), petition for cert. pending, No. 79-620. In *Monell* v. *New York City Department of Social Services*, 436 U.S. 658 (1978), this Court held that cities and counties are liable to suit under Section 1983, but it did not decide whether a qualified immunity defense would be available to them in such actions. *Id.* at 713 n.9 (Powell, J., concurring).

Such inhibitions could, moreover, discourage state and local governments from participating in federal environmental programs that depend for their effectiveness on state and local implementation. The Coastal Zone Management Act of 1972, 16 U.S.C. 1451 *et seq.*, for example, which was enacted to mitigate the destructive effects of intense development pressures on coastal areas, is designed to encourage the States "to use their *full authority* over the lands and waters in the coastal zone by assisting the states in developing land and water use programs for dealing with coastal land and water use decisions of more than local significance." Section 302(c), 16 U.S.C. 1451(c) (emphasis supplied). Under Section 305 of the Act, 16 U.S.C. 1454, grants made by the National Oceanic and Atmospheric Administration have financed up to 80% of the development costs of approved programs over the last five years. The threat of financial liability of uncertain dimensions in suits brought by landowners affected by development restrictions imposed through these federally assisted programs could discourage the development of new programs and encourage some states to revise existing programs for fear of the mere possibility that a court might deem some restriction to be a taking. The objectives of Congress in enacting the Coastal Zone Management Act would, accordingly, be

seriously undermined. See also Comment, *The Clean Water Act and Related Developments in the Federal Water Pollution Control Program During 1977*, 2 Harv. Envt'l L. Rev. 103, 178-180 (1978) (state and local land use controls in federally assisted programs under Section 208(b)(2)(F)-(H) of the Clean Water Act, 33 U.S.C. 1288(b)(2)(F)-(H)).

In sum, neither logic, precedent, nor policy considerations support appellants' contention that they are constitutionally entitled, on any theory, to a damages remedy should the zoning ordinance at issue here be deemed a taking. Should the Court reach the remedy issue, however, it may wish to confine itself to the only question discussed by the California Supreme Court: whether the Constitution requires that a landowner who successfully challenges a zoning ordinance as a taking be allowed to recover damages on a theory of inverse condemnation.

CONCLUSION

Either the appeal should be dismissed for want of a substantial federal question or the judgment of the California Supreme Court should be affirmed.

Respectfully submitted.

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APRIL 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 317066 275

Supreme Court, U. S.
FILED
FEB 21 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,

Appellants,

vs.

CITY OF TIBURON,

Appellee.

Appeal From The Supreme Court Of California

BRIEF OF AMICUS CURIAE SAN DIEGO GAS & ELECTRIC COMPANY

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BRIEF OF AMICUS CURIAE SAN DIEGO GAS & ELECTRIC COMPANY

Pursuant to Supreme Court Rule 42, San Diego Gas & Electric Company, respectfully submits this brief amicus curiae in support of the Appellants, Donald and Bonnie Agins. Counsel for both parties have consented to the filing of the brief. Copies of the letters of consent have been lodged with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

The Agins appeal from the decision of the California Supreme Court, *Agins v. City of Tiburon,* 24 Cal.3d 266 (1979), which held that a property owner can *never* state a cause of action for inverse condemnation seeking monetary compensation against a governmental body for arbitrary, excessive, and unconstitutional land use regulations which the property owner asserts have deprived the property of all use or value.

Your amicus believes that a remedy in money damages for inverse condemnation is mandated by sound public policy as an indispensable check against arbitrary and capricious excesses of the police power, by the precedents established by this Court in interpreting and applying the Constitution, and by the express guarantees of the Fifth and Fourteenth Amendments to the United States Constitution.

The issues presented in this case are matters of great concern to your amicus. San Diego Gas & Electric Company is a privately owned public utility serving San Diego County, California. In this capacity it is concerned with and involved in land use planning, both in connection with its own operations and in promotion of the public welfare. San Diego Gas & Electric Company is also the owner of a substantial amount of real property and stands, as a private property owner, in a position that is somewhat similar to that of the property owners in the case before this Court, having been denied access to the remedy of damages for a regulatory "taking." However, in your amicus' case the denial came after a full evidentiary presentation and factual findings by the trial court, affirmed by the court of appeal, that the course of action of the City deprived it of all

practical, beneficial or economic use of its land, and had effected a "taking" of property, entitling it to just compensation.

The court of appeal found on reconsideration of the case that the rule and rationale of the *Agins* decision necessitated a reversal of its earlier decision, for the clear message of the *Agins* opinion was that a cause of action in inverse condemnation for money damages can *never* be stated against a governmental body for even the most egregious abuse of the police power. Your amicus, San Diego Gas & Electric Company, has appealed its case to this Court, but no action has yet been taken on its appeal.[1]

The Agins, and your amicus, have been denied fundamental property rights which are guaranteed by the just compensation clause of the Fifth Amendment. Your amicus joins with the Agins in urging this Court to reaffirm the availability of the inverse condemnation damage remedy to private property owners challenging the excessive and unconstitutional regulatory action of the government in the land use area.

---

[1] The Jurisdictional Statement of San Diego Gas & Electric Company appealing from the adverse "reconsideration" ruling in its case, *San Diego Gas & Electric Co. v. City of San Diego,* by the California Court of Appeal, premised on the *Agins* decision, was docketed with this Court on October 26, 1979, No. 79-678. The full procedural history of the case as well as the full text of the opinions of the trial court and court of appeal are available in the Jurisdictional Statement and Appendix filed with this Court by San Diego Gas & Electric Company in that case. Extensive reference is made to the facts of that case in this amicus brief at page 15 through 21, *infra.*

ARGUMENT

I

THE CALIFORNIA SUPREME COURT HAS DENIED THE AVAILABILITY OF THE CONSTITUTIONALLY MANDATED REMEDY OF JUST COMPENSATION FOR A REGULATORY "TAKING."

The major issue presented to this Court by the *Agins* appeal can be very simply stated:

> Can a private property owner who asserts that his land has been deprived of all practical, beneficial and economic use as a result of the land use regulatory actions by a governmental entity state a cause of action in inverse condemnation seeking money damages?

The California Supreme Court affirmed the dismissal of the *Agins* complaint without allowing any factual inquiry to be made,[2] and did not even reach the issue of whether a "taking" had occurred under the facts of the case, nor whether in this particular case the allegations were true, nor even what are the proper factors to be considered in resolving the issue. The court

[2] As Appellants have pointed out in their Jurisdictional Statement at page 5, n. 1, and Reply Brief at page 6, n. 7, the facts alleged in the complaint were, as they must be, treated as being true. The City of Tiburon's statement (Motion to Dismiss or Affirm at page 5) that the Court's ruling was somehow premised on the fact that the face of the ordinance appears to permit some use, ignores the true nature of the Agins' allegations, established rules of pleading and the statement of the California Supreme Court itself.

ruled as a matter of law that no constitutional cause of action for a "taking" exists in this situation. This Court is asked by Appellants and your amicus to reaffirm that a cause of action for damages does exist for a property owner who alleges that land use regulations or activities are confiscatory.

In their complaint against the City of Tiburon the Agins alleged that the effect of the actions of the City in adopting an open space ordinance and the application of its restrictive limitations to their property completely destroyed its use and value for any purpose whatsoever, and prevented any sale, transfer or development of the property, all without due process of law and without compensation in violation of the Fifth and Fourteenth Amendments.[3]

As the California Supreme Court viewed the case, the issue was:

> [Whether] a local entity's exercise of its police power which, in a given case, may exceed constitutional limits is equivalent to the lawful taking of property by eminent domain thereby necessitating the payment of compensation.
> 24 Cal.3d 266, 272.

The California Supreme Court's answer was clear : An inverse condemnation suit and the remedy of money damages is *never* available to a property owner who alleges his property has been "taken" by a government's purported exercise of its police powers. Instead, the court selected what it described as a more

[3] Complaint, paragraphs IX, X, XXVI, XXVIII. See Appellants' Joint Appendix at 8, 11, 12.

"desirable" remedy for such situations -- invalidation of the regulation.

> We are unable to accept [the view that the "exercise of the police power which . . . exceed[s] constitutional limits is equivalent to . . . taking of property"] believing the preferable view to be that, while such governmental action is invalid . . . remedy by way of damages in eminent domain is not thereby made available.
>
> . . . .
>
> We are persuaded by various policy considerations to the view that *inverse condemnation is an inappropriate and undesirable remedy* in cases in which an unconstitutional regulation is alleged.
> 24 Cal.3d at 272, 275. (Emphasis added.)

The California Supreme Court's decision in *Agins* has elevated the police power of the government to a special, protected position and immunized all regulatory actions purportedly exercised pursuant to the police power from the Fifth Amendment guarantee of "just compenstion," even where the net effect of such regulations or actions is alleged and shown to be the deprivation of all use and value of the land.

The California Supreme Court presumed that the exercise of the police power, even when invalid, excessive, arbitrary, and unconstitutional, does not and cannot involve "taking" implications. The underlying premise of that position is that "taking" jurisprudence is limited to physical invasion or appropriation of property and simply does not occur where "mere" regulatory action is involved. Moreover, the court perceived monetary

compensation to be an "inappropriate and undesirable remedy," even assuming the property owner was denied all use of his land. The court stated that it felt that decisions in the land use planning area require flexibility and freedom and that the threat of unanticipated financial liability would intimidate and discourage innovative land use planning. 24 Cal.3d 266, 275-277.

Your amicus submits that the principles elucidated by this Court in its past decisions shaping the jurisprudence of the Fifth Amendment injunction that private property is not to be taken for public use without just compensation, reveal that the California Supreme Court's resolution of this issue is simply wrong and must be reversed.

II

THE PREVIOUS DECISIONS OF THIS COURT AND LOWER FEDERAL COURTS HAVE AFFIRMED THE AVAILABILITY OF "JUST COMPENSATION" FOR A REGULATORY "TAKING."

A. The Jurisprudence Of The "Taking" Provision Of The Fifth Amendment.

The Fifth Amendment prohibition, "nor shall private property be taken for public use, without just compensation" is applicable to the states through the Fourteenth Amendment. *Chicago, B. & Q. Railroad v. City of Chicago*, 166 U.S. 226, 239, 241 (1897).

What is a "taking" and whether a "taking" has occurred are issues that have been discussed by this Court and lower federal courts for over a century. The earlier cases confronted situations where there was physical invasion of property by the government and held such action to be a "taking" requiring compensation. *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871); *Hurley v. Kincaid,* 285 U.S. 95 (1932).

However, this Court long ago rejected the notion that a "taking" occurred only when there was a physical invasion or appropriation of property. *Dugan v. Rank,* 372 U.S. 609, 625 (1963); *accord, Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 123 n. 25 (1978).[4] It has also clearly

[4] In *Penn Central* this Court had the opportunity to review an attempt by a state court to isolate and sever invalid exercises of the police power from the consequences of the constitutional requirement of just compensation. Judge Breital, of the New York Court of Appeal, first in *Fred R. French Investing Co. v. City of New York,* 385 N.Y.S.2d 5 (1976), *appeal dismissed,* 429 U.S. 990, and then in *Penn Central,* 397 N.Y.S.2d 914 (1978) sought to effect a theoretical and conceptual separation of due process and eminent domain analysis, which, like the *Agins* decision, resulted in the rejection of the notion that invalid police power regulation can also involve a "taking" requiring the payment of "just compensation." 385 N.Y.S.2d 5, 8, 397 N.Y.S.2d 914, 917. The New York court, like the California Supreme Court in *Agins,* held that in these situations the remedy available to the property owner is not damages, but invalidation of the regulation. *Fred French, supra,* 385 N.Y.S.2d 5, 8, 10; *Penn Central, supra,* 397 N.Y.S.2d 914, 917; *Agins, supra,* 24 Cal.3d 266, 272, 276-277.

This Court in *Penn Central* while agreeing no "taking" had occurred, flatly rejected the lower court's analysis that "taking" jurisprudence was limited to physical appropriation in distinction to regulatory action. 438 U.S. 104, 123 n. 25. The Court decided the case using traditional "taking" analysis.

(footnote cont'd next page)

established that a "taking" can occur when a regulation "goes too far." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922); *Penn Central, supra,* 438 U.S. 104, 127 (1978).

In *Richmond Elks Hall Assn. v. Richmond Redevelopment Agency,* 561 F.2d 1327 (9th Cir. 1977), the Ninth Circuit Court of Appeals summarized this Court's past decisions on "taking":

> '[T]o constitute a taking under the Fifth Amendment it is not necessary the property be absolutely "taken" in the narrow sense of that word to come within the protection of this constitutional provision; it is sufficient if the

(footnote 4 cont'd from previous page)

Commentators likewise had rejected the theoretical distinction which some, including the California Supreme Court, have urged between regulations purportedly exercised pursuant to the police power (for which the remedy is invalidation) and eminent domain power (for which the remedy is damages), and found such distintions to be "illusory." *See,* Waite, *Governmental Power and Private Property,* 16 Cath.U.L.Rev. 283, 292 (1967).

> Constitutional rights rest on substance, not on form . . . a legal restriction upon the use of land may constitute a taking, although the title is unaffected and the land is physically untouched.
> 2 *Nichols on Eminent Domain,* § 6.1[a] (3rd ed. 1976).

See also, Berger, *To Regulate, Or Not To Regulate -- Is That The Question? Reflections on the Supposed Dilemma Between Environmental Protection and Private Property Rights,* 8 Loy. L.A.L.Rev. 253 (1975); Netherton, *Implementation of Land Use Policy: Police Power v. Eminent Domain,* 3 Land & Water L.Rev. 33 (1968); Van Alstyne, *Taking or Damaging by Police Power: The Search For Inverse Condemnation Criteria,* 44 S.Cal.L.Rev. 1 (1971).

> action by the government involves a direct interference or disturbance of property rights. [citations omitted.] Nor need the government directly appropriate the title, possession or use of the properties. . . .' [Citation omitted.] 561 F.2d 1327, 1330.

Rather, a "taking" occurs:

> When a public entity acting in furtherance of a public project directly and substantially interferes with property rights and thereby significantly impairs the value of the property, the result is a taking in the constitutional sense and compensation must be paid. [Citations omitted.] 561 F.2d 1327, 1330.

The needs of modern society, with the rapid growth of cities and urban density, the rapidly growing role of the government seeking to promote the common good, have created complex problems for this Court in determining when governmental action has gone "too far" and sacrificed the rights of individual citizens resulting in the "taking" of a private property interest.

To meet the complexity of the challenge and to assure that the courts remain sensitive to and aware of the competing needs in a changing world, this Court has affirmed that an inverse condemnation remedy is available to challenge regulation which goes "too far," but held that the resolution in each case must be addressed on an individual basis.

> This is not to say, however, that governmental activities in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation [citation

> omitted]. There is no set formula to determine where regulation ends and taking begins. *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 594 (1962).

The rationale underlying the prohibition on government actions and the protection to the property owner afforded by the Fifth Amendment has been clearly articulated by this Court:

> The Fifth Amendment's guarantee that private property shall not be taken for public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. *Armstrong v. United States,* 364 U.S. 40, 49 (1960).

As Justice Holmes noted:

> [A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. *Pennsylvania Coal, supra,* 260 U.S. 393, 416 (1922).

B. Recent Decisions Of This Court Have Reaffirmed The Availability Of The Damage Remedy For Regulatory "Taking" And Required A Factual, Ad Hoc, Case-By-Case Resolution.

1. The Damage Remedy Is Available.

The validity and vitality of the constitutional principles just reviewed were reaffirmed by this Court in *Penn Central, supra,*

438 U.S. 104, 123-128 (1978). The Court in *Penn Central* held that land use regulatory restrictions do indeed involve Fifth Amendment considerations and compensation is available as a remedy. When such a regulatory "taking" has occurred, this Court said, the property owner is to be "compensated," for the government is "*to pay* for any losses proximately caused by it. . . ." 438 U.S. 104, 124.

Last term in *Lake Country Estates v. Tahoe Regional Planning Agency,* ___ U.S. ___, 99 S.Ct. 1171, 1176-1177 (1979), this Court expressly held that a damage cause of action could be stated against a bi-state regional agency for allegedly arbitrary and unreasonable land use regulations. The inherent and essential premise of that position is that a cause of action alleging a "taking" and seeking "just compensation" *can* be stated by an aggrieved property owner against a governmental agency.

Again, only two months ago the Court through Justice Rehnquist, in the case of *Kaiser Aetna v. United States,* ___ U.S. ___, 100 S.Ct. 383 (1979) cited the *Penn Central* standards approvingly, and found a "taking."

Lower federal courts relying on the clear precedents of the Court have likewise held that money damages are available for interferences with property rights by the exercise of the police power.

> [A] governmental agency acting pursuant to the States' police power must pay just compensation for any taking it effects.
> *Richmond Elks Hall Assn., supra,* 561 F.2d 1327, 1332.

See also, Gordon v. City of Warren, 579 F.2d 386 (6th Cir. 1978); *Dahl v. City of Palo Alto,* 372 F.Supp. 647 (N.D. Cal. 1974).

The position of the California Supreme Court in *Agins* denying the availability of the damage remedy is, quite frankly, untenable and shocking when viewed against these well-established constitutional principles and precedents. The purported "undesirable" nature of the inverse condemnation remedy from a social policy standpoint is no basis for ignoring the constitutional guarantees.

2. Whether A "Taking" Has Occurred Requires A Factual, Ad Hoc, Case-By-Case Resolution.

The determination of whether particular regulatory restrictions have resulted in a "taking" (an issue that could not be reached by the California court because of its erroneous conclusion on the preceding issue) has proved "to be a problem of considerable difficulty," for which the Court has indicated it had not yet developed a set formula. *Goldblatt v. Town of Hempstead, supra,* 369 U.S. 590, 594; *Penn Central, supra,* 438 U.S. 104, 124; *Andrus v. Allard,* ___ U.S. ___, 100 S.Ct. 318 (1979); *Kaiser Aetna, supra,* 100 S.Ct. 383 (1979). In *Penn Central* this Court specified that in each case where such an allegation is made the resolution will depend on an "ad hoc, factual inquiry" based on the particular circumstances of each case (438 U.S. 104, 124), looking to the consequences and impacts of the actions. The Court also identified those factors which it felt were "particularly significant" in determining whether a "taking" has occurred:

> (1) [T]he extent to which the regulations has interfered with the distinct investment-backed expectations [of the claimant] . . . .
>
> (2) [T]he character of the governmental action.
>
> (3) The economic impact of the regulation on the claimant; . . .
> *Penn Central, supra, 438 U.S. 104, 124.*

See also Kaiser Aetna, supra, 100 S.Ct. 383.

Your amicus contends that when a complaint alleges that the *effect* of a regulation or action has resulted in a loss of all value and use of private property as does the Agins' complaint, it is constitutionally impermissible, based on the precedents and principles established by this Court, and a violation of the express guarantees contained in the Fifth Amendment, for a state court to rule that a cause of action for damages in such a situation can never be stated. When the challenge to and the allegation of "taking" arises not from the face of ordinance but from the *effects* of the actions of governmental body and the *effect* of the regulatory restrictions on the property, it is improper and a violation of elementary rules of pleading, to dismiss such a complaint looking only to the face of the ordinance[5] and refuse to allow the full factual inquiry into the allegations as required by this Court. The Agins have in their complaint stated a constitutional cause of action in inverse condemnation against the City of Tiburon and they must be allowed to proceed to a trial on that issue to prove their allegations.

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5 As already pointed out in note 2, *supra,* this was not the basis for the California court's holding, but in any event, its holding cannot be rationalized *post hoc* on this basis.

III

A REAL WORLD EXAMPLE OF THE NEED FOR THE DAMAGE REMEDY TO ASSURE FAIRNESS AND JUSTICE IN THE LAND USE REGULATION CONTEXT.

A. A Case Study In Regulatory "Taking" : Property Can Be "Taken" As Easily And Effectively By Regulation As By Physical Invasion.

As a practical matter, to permit a property owner who has alleged that a "taking" has occurred as a result of the *impact* and *effect* of regulatory activities on his property to prove his allegations is not an empty routine or formalism. This can be vividly demonstrated by looking to the case of *San Diego Gas & Electric Co. v. City of San Diego,* currently on appeal to this Court, Docket No. 79-678,[6] which case also strikingly demonstrates the drastic and unfair consequences to a property owner which flow from the application of the rule and rationale in *Agins.*

The property owner, San Diego Gas & Electric Company, in 1974 filed a complaint against the City of San Diego seeking damages on a theory of inverse condemnation alleging that the

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6 See footnote 1, *supra. San Diego Gas & Electric Co. v. City of San Diego,* 146 Cal.Rptr. 103 (1978), (hearing granted by California Supreme Court 7/13/78, retransferred to California Court of Appeal on 6/14/79, redetermined by California Court of Appeal by unpublished opinion dated 6/26/79, petition for rehearing denied 7/9/79, petition for hearing in California Supreme Court denied 8/22/79, appeal docketed in United States Supreme Court 10/26/79 as No. 79-678).

continuing course of conduct of the City of San Diego in its regulatory zoning and planning activities (rezoning and designating plaintiff's property as agricultural and industrial, but including the property within the "open space" element of the general plan, while commencing but then abandoning, direct condemnation efforts) rendered its property economically useless, of no value, and effected a "taking" of private property without compensation in violation of the California and United States Constitutions. The matter proceeded to trial for a full factual exploration of the property owner's allegations.

At the trial the property owner presented a full panoply of evidence to support its "taking" allegation. The trial was held two years prior to this Court's decision in *Penn Central, supra,* 438 U.S. 104 (1978); nonetheless when the trial record is examined it interestingly reveals that the evidence presented by the property owner tracks the factors this Court later found in *Penn Central* (and reaffirmed in *Kaiser Aetna*) to be "particularly significant" in showing that a "taking" has occurred.

The property owner presented evidence to establish that a protectable property interest was involved and that it had "district investment-backed expectations" as to the property:

> The property owner acquired the land for a specific purpose, industrial, as a future site for a power plant. The property owner discussed its intentions and plans for the use of the site with the City. In assembling the size parcel needed for its expected use the property owner acquired, at fair market value, some 25 acres from the City of San Diego itself. At the time of acquisition, the

> General Plan of the city and the zoning permitted the use property owner intended and expected to make of the property.[7]

The property owner presented evidence to establish the arbitrary, excessive, and unconstitutional "character of the actions" of the City:

> At the time of acquisition, under the General Plan and zoning regulations, the property owner could have used the property for its intended industrial purpose. Subsequent to plaintiff's acquisition of the land, the City commenced but abandoned direct acquisition of the property for use as park and open-space. The City rezoned some of the land from industrial to agricultural. The City revised its General Plan and adopted an open-space element including the subject property within the area designated as "open-space." Industrial use is not consistent with "open-space" designation. The City as a matter of policy requires consistency between zoning and its General Plan.[8]

The property owner presented evidence to demonstrate that the "economic impact" of the regulatory actions on its property was to frustrate its expectations and to render the property economically useless and without value:

---

[7] The evidence presented by the property owner is set forth by the trial judge in the Findings of Fact and Conclusions of Law and in the original opinion of the court of appeal which appear in the Appendix which accompanied San Diego Gas & Electric Company's Jurisdictional Statement ("SDG&E Appendix"), filed on October 26, 1979, Docket No. 79-678 at SDG&E Appendix, A-2 through A-8 and B-1 through B-14.

[8] See note 7 *supra*.

> Some of the land was zoned agricultural but could not be used for that purpose because of the soil's high salt content. The land could not be used for residential or any similar use because it is in a flood plain. The land's only possible economic use was for industrial purposes, but no industrial use was possible. The subject property was included within the open-space element of the City's General Plan, and evidence showed that as a matter of policy the City requires a use consistent with the open-space designation. Industrial use was not consistent with the open-space designation.[9]

Following the presentation of the evidence the trial court concluded:

> [P]laintiff has been deprived of all practical, beneficial or economic use of the property. . . .
>
> . . . .
>
> In light of the particular characteristics of the said property, there exits no practical, beneficial or economic use of the said property. . . .
>
> . . . .
>
> The actions of the city were motivated to achieve a public purpose, namely, preservation of open space . . . and were so burdensome and oppressive as to deprive plaintiff of any practical, beneficial or economic use of the property . . . and, therefore, taken as a whole,

9 See note 7 *supra*.

> constitute a taking . . . without due process of law and just compensation.[10]

The judgment and award of compensation was originally affirmed by the California Court of Appeal. In reviewing the case the court articulated what it understood to be the proper constitutional standards for evaluating whether a "taking" has occurred:

> [T]here is no set formula . . . to draw the line where regulation ends and taking begins.
>
> . . . .
>
> [Whether] there has been inverse condemnation through excessive regulation is a factual matter. . . .
>
> . . . .
>
> Whether what may have begun as a legitimate use of the police power became so unreasonable as to be a taking is a question of fact.[11]

Reviewing the evidence in detail, the court of appeal affirmed the conclusion that the City's entire course of action ("the zoning on the property plus its inclusion in the open space element plus the City's policy of requiring consistency between zoning and the general plan plus City's overtures to purchase the land for open space,"[12] resulted in the deprivation of all

10 SDG&E Appendix A-7, A-8.

11 SDG&E Appendix B-4, B-6, B-13. 146 Cal.Rptr. 103, 110, 112, 118.

12 SDG&E Appendix B-8. 146 Cal.Rptr. 103, 114.

practical, beneficial, and economic use of the land and was "an example of inverse condemnation and the landowner should, under the Constitution, be compensated."[13]

It is difficult to envision a better example of a state court following what until *Agins* was understood to be required in a "taking" case under the precedents established by this Court and the express language of the Constitution. The case convincingly demonstrates the validity and the need for allowing a plaintiff who has alleged that the impact or effects of excessive regulatory actions have resulted in a "taking" of his property to proceed past the pleading stage to prove his allegations. Although, in isolation the zoning ordinance on its face perhaps did not appear clearly confiscatory and the regulatory planning actions on their face perhaps did not appear clearly excessive, *when full factual inquiry was made into the character of the action, and the nature and extent of the interference with the rights of the property owner, and the economic impact of the regulation on the claimant, it was clear that a constitutional "taking" had been effected.* The principles of justice and fairness upon which the Fifth Amendment is premised required that the "economic injuries caused by public action be compensated by the government." *Penn Central, supra,* 438 U.S. 104, 124.

The total abrogation of property rights which flows from the rule announced by California Supreme Court in *Agins,* is lucidly shown by the result in the *San Diego Gas & Electric Company* case following *Agins.* Despite the full factual inquiry by the trial court and the conclusion by both the trial court and the California Court of Appeal that the action did result in a

---

13 SDG&E Appendix B-8. 146 Cal.Rptr. 103, 114.

"taking" requiring compensation, when the case was "reconsidered" in light of *Agins,* it was found:

> A local entity's arbitrary unconstitutional exercise of the police power does not require compensation. . . .
>
> . . . .
>
> The judgment is reversed.[14]

B. Invalidation Is Constitutionally And Practically An Inadequate Remedy.

The remedy of invalidation found by the California Supreme Court to be more "desirable" and "appropriate" in situations where excessive regulatory action are challenged is illusory when examined in the context of "real" cases, and is constitutionally inadequate.

The illusory nature of the remedy is again demonstrated by the *San Diego Gas & Electric Company* case, where more than six years after the conceded confiscation of private property, and after four separate levels of judicial review, the property owner is still without relief, while its property is being used for benefit of the public as open space.[15] Moreover, what San Diego Gas & Electric Company alleged in its complaint and proved at trial was that the entire course of conduct of the City,

---

14 SDG&E Appendix G-4.

15 The ineffectiveness of the invalidation remedy as a procedural matter in California has already been pointed out to the Court in Appellant's Jurisdictional Statement. J.S. 28-29.

not just a specific regulation, resulted in the "taking." As a practical matter, how can a course of conduct be invalidated? And what is to prevent repetition of a similar course of conduct, with only slight modifications?

So too in the instant case, while a specific ordinance is involved, the *Agins* have not alleged that that ordinance on its face constitutes a "taking" or that the ordinance by itself constitutes a "taking," but rather that the ordinances as *applied* when combined with the *effects* of other actions of the city constitute a "taking."

As a constitutional remedy, invalidation is inadequate to protect private property rights. The California Supreme Court, while giving superficial lip service to the property concepts protected by this Court (*Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972); *U.S. v. General Motors Corp.*, 323 U.S. 373, 377 (1945)), effectively repealed private property rights in California and "pronounce[d] that henceforth in California title to real property will no longer be held in fee simple but rather in trust for whatever purposes and uses a governmental agency exercising legislative power elects, without compensation." 24 Cal.3d 266, 282 (Justice Clark, dissenting).

Your amicus submits that to deny *categorically* the damage remedy for inverse condemnation to a property owner, when a regulatory "taking" is alleged and when it has been found upon full factual inquiry to have occurred, is to vitiate the constitutional guarantee, "nor shall private property be taken, without just compensation."

CONCLUSION

The California Supreme Court in the *Agins* decision has immunized all land use regulatory activities purportedly exercised pursuant to the police power from the reach of the Fifth Amendment guarantee of just compensation. Your amicus believes that the decision has effectively rewritten and abrogated private property rights guaranteed under the Fifth Amendment of the United States Constitution creating a significant exception to the protections of the Fourteenth Amendment due process clause.

Governmental regulatory activities in the land use planning area exercised under the guise of its "police powers" should not and cannot be *categorically* immunized from "taking" consequences. The good intentions and nobility of the land use planners goal of preserving the environment and urban aesthetics by designating land as open space and restricting the use that can be made of such land do not make these actions exempt from the constitutional mandate that when these regulations go too far and private property is "taken" for public use just compensation must be paid to the property owner under the express guarantee of the Fifth Amendment and the precedents of this Court.

The remedy of "just compensation" is not an "optional" remedy to be selected or cast aside by a state court because it perceives another remedy, in this case, invalidation, to be more desirable. If the Fifth Amendment guarantee of "just compensation" for the "taking" of property, designed to assure that the individual property owner is not asked to bear more than his fair share, is to have continued vitality and meaning in modern society a cause of action for damages must remain available as a

remedy to a property owner who alleges a "taking" of his property by excessive regulation. Your amicus believes that the decisions of this Court clearly establish that the inverse condemnation remedy is available where excessive regulation is alleged to constitute a "taking," just as it is available to a property owner who alleges a "taking" through physical invasion of his land by the government.

The California Supreme Court in its *Agins* decision has proceeded oblivious to, and perhaps in contempt of, these long-standing Federal precedents. The absolutely fundamental nature of the Fifth Amendment guarantees will not permit countenancing state court experimentation on the basis of social "desirability." It is once again time for this Court to reaffirm that private property rights and the Fifth Amendment guarantees still have meaning in California.[16]

---

[16] In another recent decision by the California Supreme Court, *Robins v. Pruneyard Shopping Center,* 23 Cal.3d 899 (1979), the court again relegated private property rights to an inferior position, despite the express guarantees of the Fifth and Fourteenth Amendments and the clear precedent established by this Court in *Lloyd Corp. v. Tanner,* 407 U.S. 551 (1972). Review was granted by this Court on November 13, 1979, No. 79-289.

The California Supreme Court, although having the benefit of strong dissents in both *Robins* and *Agins* highlighting federal precedents, seems to be unable to accept a basic tenent of our judicial system: under the supremacy clauses of both the United States Constitution (article 6) and the California Constitution (article 3, § 1), the California court is bound by the express terms of the Fifth and Fourteenth Amendments and this Court's interpretations thereof.

Respectfully submitted,

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Supreme Court, U. S.
FILED
FEB 21 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS AND BONNIE G. AGINS, *Appellants*

v.

CITY OF TIBURON, *Appellee*

On Appeal From The Supreme Court Of California

BRIEF AMICI CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE CALIFORNIA BUILDING INDUSTRY ASSOCIATION IN SUPPORT OF APPELLANTS

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February 1980

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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v.

CITY OF TIBURON, *Appellee*

On Appeal From The Supreme Court Of California

BRIEF AMICI CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE CALIFORNIA BUILDING INDUSTRY ASSOCIATION IN SUPPORT OF APPELLANTS

Amici have received the parties' written consent to file this brief and have filed the letters of consent with the Clerk of the Court.

INTEREST OF AMICI

The National Association of Home Builders represents approximately 125,000 builder and associate members organized in 758 affiliated state and local

associations in the fifty states, District of Columbia, and Puerto Rico. Its members include not only people and companies that construct and supply single-family homes but also apartment, condominium, commercial, and industrial builders, as well as land developers and remodelers. The affiliated California Building Industry Association, composed of six regional and twenty local associations, has approximately 5,000 members that produce about seventy percent of the state's housing. We are the voice of the American and California shelter industry.

The Associations have a fervent interest in a just and fair approach to government use of private land, until now protected ultimately by the Constitution. Intertwined with this interest is the Associations' active involvement in trying to control the causes of skyrocketing housing costs. The impacts on our home buying and renting public and on the Associations' membership have been devastating. Throughout the past decade, an increasing percentage of low and moderate income families have been priced out of the housing market.

A major cause of this disturbing phenomenon has been the growing enactments of unduly restrictive zoning and land use controls by many shortsighted local governments. If the decision of the court below is not reversed, the practical capability of successfully challenging otherwise unconstitutional land use policies will greatly diminish, thereby accelerating the growth of exclusionary practices and further impeding the ability of this industry to assist the nation in meeting its critical housing needs.

CONSTITUTIONAL PROVISIONS INVOLVED

Article six of the United States Constitution provides in pertinent part: "This Constitution . . . shall be the supreme law of the land; and the judges in every State shall be bound thereby. . . ."

The fifth amendment to the Constitution provides in pertinent part: ". . . nor shall private property be taken for public use, without just compensation."

The fourteenth amendment provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

QUESTION PRESENTED

Whether a state court can rule out the right of property owners to file compensatory taking, or inverse condemnation, actions in direct contravention of the United States Constitution and Supreme Court rulings thereunder.

ARGUMENT

I. The Decision of the Court Below Effectively Destroys the Right To Make a Compensatory De Facto Taking Claim Despite the Just Compensation Clause and Rulings of This Court and Thus Denies a Needed Remedy for Controlling Aggravated Housing Costs.

In a sweeping and unprecedented policy decision that goes far beyond the circumstances of the particular case, the lower court has declared that henceforth no one may *bring a claim* under the United States and California Constitutions for inverse condemnation damages, that is, allege a de facto taking of private property by police power action without just compensation. The decision is overly simplistic in its legal reasoning, bereft of any real comprehension of its

social and land use ramifications, and at odds with the long-standing principles underlying the law of de facto taking. The fifth amendment, made applicable to the states through the fourteenth amendment (*Chicago, B.&Q.R.R.* v. *City of Chicago,* 166 U.S. 226 (1897)), prohibits not only the deprivation of property without due process of law but also, in a separate clause, the taking of property without just compensation.

By ruling that an aggrieved plaintiff may only make a claim for equitable relief, rather than a claim for damages, the lower court has effectively merged the Constitution's due process and just compensation clauses so as to preclude any claim under the latter. Aside from the violence this does to the words and meaning of the fifth amendment, it makes for irrational and unfair land use policy because a government regulation could be legally valid, not justifying a declaratory, injunctive, or mandamus remedy, yet at the same time so harsh as to deny a person all reasonable use of his land, thereby justifying the inverse condemnation remedy (of course, a regulation could also be invalid and a taking as well.) [1] A further effect of the lower court's decision is to shift to California's federal courts all regulatory land use cases in which an allegation of unconstitutional taking without just

[1] For the importance as to remedy in the fifth amendment's distinction between deprivation and taking, *see* Comment, ***Balancing Private Loss Against Public Gain To Test for a Violation of Due Process or a Taking Without Just Compensation,*** 54 Wash. L. Rev. 315, 319-27 (1979); D. Godschalk, et al., Constitutional Issues of Growth Management 53-64 (rev. ed. 1979); D. Mandelker, Managing Our Urban Environment 624 (2d ed. 1971); Dunham, ***From Rural Enclosure to Re-Enclosure of Urban Land,*** 35 N.Y.U. L. Rev. 1238, 1253-54 (1960).

compensation is made, thus increasing the federal judiciary's land use law caseload, a field traditionally left to the state courts.

Equally important is the deleterious effect of *Agins* on housing costs. It is no mere happenstance that this case arose in an exclusive Marin County, California community. From 1969 through 1978, the percentage of American families able to afford the median-priced new house has dropped from almost 40 to below 24 percent. National Association of Home Builders, Economics Department; B. Frieden and A. Solomon, *The Nation's Housing: 1975-1985* 125 (Joint Center for Urban Studies of MIT & Harvard 1977). A recent federal government task force has found that since the early 1970's, rising housing costs have been "greatly exacerbated by" growing local land use regulations that unnecessarily restrict new housing development. "These new factors that have quickened the pace of rising housing costs portend a long-term problem for the future unless major steps are taken." U.S. Department of Housing & Urban Development, *Final Report of the Task Force on Housing Costs* 4 (May 1978); *see* U.S. General Accounting Office, *Report to the Congress—Why Are New House Prices So High, How Are They Influenced by Government Regulations, and Can Prices Be Reduced?* 41 (May 1978).

Otherwise unconstitutional land use controls that effectively exclude low and moderate income housing from the community are very difficult to challenge successfully. *Agins* would increase the burden much higher. If a local governing authority should have a particular control declared invalid or unconstitutional by a court, the authority all too often responds by taking another regulatory action to accomplish the

same or similar result. Even if the subsequent action is likewise challenged successfully, the enormous time and expense involved in litigation often obliterates the original housing goal sought. And should any housing finally be constructed, the added costs of delay are inevitably borne by the housing consumer as well as builder.[2] But the natural propensity to shift regulatory gears rather than deal directly with the problem is frequently eviscerated if taking damages can be claimed and proven.[3] To paraphrase Dr. Johnson, depend upon it, sir, when a government knows it is to be assessed damages in a fortnight, it concentrates its mind wonderfully.

The Douglas Commission, in its exhaustive report to the President and Congress a decade ago, found that certain zoning and other land use control abuses unnecessarily increased housing costs to such a degree as to lead to exclusionary practices relating to residential developments. This frequently resulted when "[t]he community rigs its master plan and accompanying zoning ordinance" with "excessive" standards and prohibitions. One of the Commission's recommen-

[2] Individual prospective home buyers almost by definition are not organized in such a fashion as to exert meaningful pressure or influence on a community's exclusionary land use policies. As noted in a study by the Rutgers University Center for Urban Policy Research:

> The deficiency of the emphasis on [protecting existing home owner] property rights was that it failed to take into account the rights of prospective homebuyers who were excluded from any municipalities by the excessive cost of suburban homeownership. S. Seidel, Housing Costs and Government Regulations 380 (1978). *See also* M. Mann, The Right to Housing—Constitutional Issues and Remedies in Exclusionary Zoning (1976); L. Sagalyn & G. Sternlieb, Zoning and Housing Costs —The Impact of Land-Use Controls on Housing Price (1973).

[3] *See* note 11 *infra*.

dations for a regulation that went so far as to take one's property was that compensation should be paid. This, the Commission thought, would assist in leading toward a more orderly urban development. Report of the National Commission on Urban Problems, *Building the American City* 18-19, 199-253 (specifically 206, 211-17, 224-26, 251) (1968). *Agins'* effect, however, makes it much easier for parochial governments to do as they please with absolutely no judicial check (constitutional remedy) available should some control go too far and result in compensatory damage and, therefore, makes it much harder to surmount excessive or arbitrary policies that push up housing costs.

Professor Williams summed it up best in his landmark treatise when he recognized that inverse condemnation[4] "can play a useful role as part of an overall land use regulation system, to provide some protection for landowners against de facto takings." 5 N. Williams, American Planning Law—Land Use and the Police Power § 159.18 (1975). More to the point, this Court as recently as last term acknowledged in a legislative immunity case the *constitutional right*

[4] Defined as "the popular description of a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *Thornburg* v. *Port of Portland*, 233 Or. 178, 180 n.1, 376 P.2d 100, 101 n.1 (1962); *City of Jacksonville* v. *Schumann*, 167 So.2d 95, 98 (1st D.C.A. Fla. 1964), *cert. denied*, 172 So.2d 597 (Fla. 1965), *cert. denied*, 390 U.S. 981 (1968) (takings found in airplane overflight cases); 11 E. McQuillin, The Law of Municipal Corporations § 32.132a (3d ed. rev. 1977). More simply, "inverse condemnation" has been described as an action "to redress a taking without compensation." *Sixth Camden Corp.* v. *Township of Evesham*, 420 F. Supp. 709, 721 (D.N.J. 1976).

to file an "inverse condemnation" action, ruling further that this was not the occasion to review the circuit court's holding that a violation of the due process clause had been adequately alleged, in which appellants had claimed that an improper exercise of the police power had led to a "taking" or an "inverse condemnation." *Lake Country Estates* v. *Tahoe Regional Planning Agency,* 440 U.S. 391, 395-96, 397 n.11 (1979); *see Jacobson* v. *Tahoe Regional Planning Agency,* 566 F.2d 1353 (9th Cir. 1977).

What this Court acknowledged as constitutionally allegable on March 5, 1979, the *Agins* court read abruptly out of the Constitution nine days later.

Lake Country Estates is the tip of an iceberg of Supreme Court taking cases stretching back a century. The first notable such case, *Pumpelly* v. *Green Bay Co.,* 80 U.S. (13 Wall.) 166 (1871), found a compensable taking when flooding effectively destroyed a property's usefulness despite the absence of an actual appropriation for public use. It exemplifies the simplest type of inverse taking, that of physical invasion. *Pumpelly* also provides a vivid illustration of the essence of inverse condemnation (a phrase that gained prominence in the 1960's)—the transmutation of police power exercise or regulation into an exercise of compensable taking. As explained in 2 P. Nichols, The Law of Eminent Domain § 6.1[1] (3d ed. rev. 1976):

> Any limitation on the free use and enjoyment of property constitutes a *taking* of property within the meaning of the *constitutional provision.* It is sufficient that the person claiming *compensation* has some right or privilege in the appropriated property, which right or privilege is destroyed, injured or abridged by such appropriation . . . .

> *Constitutional rights rest on substance, not on form,* and the liability to pay compensation for property taken cannot be evaded by leaving the title in the owner, while depriving him of the beneficial use of the property. It has already been shown that a legal restriction upon the use of land may constitute a taking, *although the title is unaffected and the land is physically untouched,* and the same is true when the owner's enjoyment of the land is physically interfered with although his legal rights remain unimpaired. (emphasis added).

A half century after *Pumpelly,* the philosophical underpinning of inverse condemnation gained its fullest expression in the "leading"[5] taking case of *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922). Justice Holmes framed the question of the case as "whether the police power can be stretched so far"[6] and went on to hold *not* when "the extent of the taking is great."[7] Hence it has for years been strongly held that alleged abuse of the police power can be remedied, where proven appropriate, by constitutional just compensation. Equally important for purposes of this appeal, the *right to file* and attempt to prove such a claim is obviously implicit in the Court's result.

> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. [cite omitted]. When this seemingly

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[5] *Penn Central Transportation Co.* v. *New York City,* 438 U.S. 104, 127 (1978).

[6] 260 U.S. at 413.

[7] 260 U.S. at 414.

absolute protection is found to be *qualified by the police power, the natural tendency of human nature is to extend the qualification more and more* until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

> *The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . .* We are in danger of forgetting that *a strong public desire to improve the public condition is not enough* to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions. 260 U.S. at 415-16 (emphasis added).

The *Agins* court plainly succumbed to that "natural tendency of human nature." Instead of determining if a specific case for inverse condemnation had been adequately made out, the court merely acknowledged the public value of land use planning and execution ("to improve the public condition") and then inexplicably placed that value forever above the Constitution's just compensation clause.

Most recently, this Court has rejected such a peremptory approach in the telling decision of *Kaiser Aetna* v. *United States,* 100 S. Ct. 383 (1979). In finding that a compensable taking had occurred based on the case's circumstances, the opinion of the Court reasoned that the government's regulation or use of petitioners' property had gone "so far . . . as to amount to a taking under the logic of *Pennsylvania Coal* v. *Mahon, supra.*" 100 S. Ct. at 392, 393. Put simply and directly, *Agins* just does not square with a century's worth of taking law.

It is legal and social folly to strive for worthy environmental improvement (with the Agins, the city deemed their property desirable as open space for its scenic view of San Francisco Bay) by simplistically pitting the taking question as "police power" versus "eminent domain power."

> There is an almost *irresistable urge* in this matter to think of the question in terms of police power versus eminent domain—as if the choice of means for working for environmental improvement had to be either one or the other. The process of choosing means for implementing policy goals for environmental improvement thus tends to start with the premise that public agencies should first see how far they can go in requiring landowners to submit to regulatory controls of land use, and resort to eminent domain techniques only where the courts compel them to compensate landowners for a "taking" of property. Netherton, *Implementation of Land Use Policy: Police Power vs. Eminent Domain,* 3 Land & Water L. Rev. 33, 50 (1968) (emphasis added).

Netherton, explaining that the either/or approach is an unfair and unwise way to protect the community environment, argues for the judicious approach in the "gray areas between those situations where it is obvious that police power should be used and those where it is not so obvious":

> During the period of experimental regulation the landowner's interest can be protected by recourse to an action in *inverse condemnation* where he can sustain the burden of proving damages. Netherton at 55 (emphasis added).

Yielding to the "irresistable urge," the court below, despite explicit constitutional provisions against tak-

ings[8] and countless judicial rulings thereunder, has created an illusory distinction that, in practice, renders inverse condemnation suits nugatory in California courts. As Professor Waite, who supports *Pennsylvania Coal's* "diminution of property value" test as one way of judging when police power regulation becomes compensable, said:

> Today it is hard to justify the different compensation philosophies applied to landowners in eminent domain and police power matters . . . . [R]emembering property to be a bundle of rights, it is clear this distinction, too, is illusory. The *substantive* content of title is largely rights of use, and in *both* situations a transfer has occurred . . . Waite, *Governmental Power and Private Property,* 16 Cath. U.L. Rev. 283, 292 (1967) (emphasis added).

This distinction without a difference in the taking context,[9] implicit in *Pennsylvania Coal* and taking cases since, is perhaps most forcefully explicated by

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[8] The California Constitution's just compensation clause is technically broader than that of the United States Constitution. It reads: "Private property may be taken or damaged for public use only when just compensation . . . has first been paid to . . . the owner." Cal. Const. art. 1 § 19. Half the states have "damaged" provisions in their constitutions (all fifty have just compensation clauses, which have been interpreted as substantially the same as the federal clause, with or without the "damaging" language). Note, *Inverse Condemnation: The Case for Diminution in Property Value as Compensable Damage,* 28 Stan. L. Rev. 779, 779 n.2 (1976).

[9] *See* Berger, *To Regulate, Or Not to Regulate—Is That the Question? Reflections on the Supposed Dilemma Between Environmental Protection and Private Property Rights,* 8 Loy.L.A.L. Rev. 253, 268-75 (1975); Beuscher, *Some Tentative Notes on the Integration of Police Power and Eminent Domain By the Courts: So-Called Inverse or Reverse Condemnation,* 1968 Urb. L. Ann. 1, 4.

the Texas courts. In *San Antonio River Authority* v. *Garrett Brothers,* 528 S.W.2d 266, 273 (Tex. Civ. App. 1975), where a compensable "temporary taking" was found in a city's refusal to issue utility permits for land the city might later acquire, the court explained:

> If there is a taking the constitution requires payment, even though the taking be for the purpose of promoting the public health, safety, morals or welfare and, therefore, involves an exercise of the police power. [cites omitted]. *The empty formalism of "police power" cannot be made the basis for denying compensation,* and the Texas Supreme Court has expressly refused to "compartmentalize an exercise of sovereignty as either police power or eminent domain for the resolution of [taking] problems arising under [the state constitution]." (emphasis added).[10]

It is one thing to review the facts and circumstances of a case and then to reject its claims as improvidently made. It is quite another matter, however, to decide

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[10] In a later case for "inverse condemnation" damages, where a city denied a development permit in order to gain a scenic easement for the public, the court stated:

> [T]here is really no distinction between the powers of eminent domain and an exercising of the police power, when a person's property is taken or the use of same damaged by the state (or city). A person's property may not be taken or damaged as an incident to the exercise of the police power without the payment of compensation. *City of Austin* v. *Teague,* 556 S.W. 2d 400, 403 (Tex. Civ. App. 1977).

The state supreme court reversed on other grounds and remanded for retrial of the amount of damages and noted:

> The labels are not helpful. These two doctrines—police power and eminent domain—*merge at so many places when applied to specific problems,* that the legal battlefields have been variously termed a "sophistic Miltonian Serbonian Bog," . . . a "crazy-quilt pattern," . . . "the manifest illusoriness of distinctions," . . . . 570 S.W. 2d 389, 391 (Tex. 1978) (emphasis added).

for expedient reasons that a constitutional cause of action can no longer even be raised under any circumstances for fear that it may disrupt the regular flow of governmental land use decisions. This unfounded fear of governmental disruption is especially ironical given the profound disruption now to be visited upon the principle supporting an equitable approach to land management and the providing of affordable housing. Until the *Agins* opinion, the just compensation clause has never been treated by any court as sheerly precatory language.

II. The Decision of the Court Below Is Manifestly Contrary to the Case-By-Case Review Required by the Just Compensation Clause and Rulings of This Court.

The constitutional dilemma peremptorily sworn off by the *Agins* court was specifically addressed by this Court in *Penn Central Transportation Co.* v. *New York City,* 438 U.S. 104 (1978). A classic taking case, the issue was whether application of a regulatory land use ordinance resulted in a "temporary taking" of property without just compensation in violation of the fifth and fourteenth amendments. 438 U.S. at 107, 119. While *Penn Central* acknowledged the high burden of proving a taking and, under the facts of the case, found no taking had occurred, *its comprehensive analysis upholds the constitutional right to make the claim and attempt to prove it under law.* This becomes absolutely fundamental because taking questions are "essentially ad hoc, factual inquiries" with no "set formula" to guide a court since the very question of a taking "depends largely upon the particular circumstances" of each case. 438 U.S. at 124; *Kaiser Aetna, supra,* at 390 (taking found).

Save for the erratic *Agins* opinion, the necessity of case-by-case constitutional analysis has been uniformly emphasized by courts and commentators alike. Again, Justice Holmes sets the framework in *Pennsylvania Coal*:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. *So the question depends on the particular facts . . . . [I]t always is open to interested parties to contend that the legislature has gone beyond its constitutional power.* 260 U.S. at 413 (emphasis added).

In *Berman* v. *Parker,* 348 U.S. 26, 32 (1954), in which a property owner alleged that a land use plan for urban renewal violated both the fifth amendment's due process and just compensation clauses as applied to his land, Justice Douglas said without reservation:

> We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, *for each case must turn on its own facts.* (emphasis added) (*accord, e.g., Armstrong* v. *United States,* 364 U.S. 40, 48 (1960)).

And the Court in *Goldblatt v. Town of Hempstead,* 369 U.S. 590. 594 (1962), in upholding an ordinance

that prevented further mining by appellant, firmly noted:

> This is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation. [cited omitted]. *There is no set formula to determine where regulation ends and taking begins.* (emphasis added).

Doubtlessly, then, case-by-case determinations of whether land use controls result in compensable takings must be made. 1 R. Anderson, American Law of Zoning § 3.25 (2d ed. 1976); 11 E. McQuillin, The Law of Municipal Corporations § 32.26 (3d ed. rev. 1977); 2 P. Nichols, *supra,* at § 6.3; 1 A. Rathkopf, Law of Planning and Zoning § 6.02 (4th ed. 1978); 2 P. Rohan, Zoning and Land Use Controls § 7.03[3][d] (1978); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria,* 44 S. Cal. L. Rev. 1, 13-48 (1970); Waite, *supra,* at 289. Otherwise, the very words of the just compensation clause ring hollow. "The issue of regulation as against taking is always a matter of degree." *Morris County Land Improvement Co.* v. *Township of Parsippany - Troy Hills,* 40 N.J. 539, 193 A.2d 232, 241 (1963); *accord, e.g., Donohoe Construction Co.* v. *Montgomery County Council,* 567 F.2d 603, 608 n.13 (4th Cir. 1977); *Dahl* v. *City of Palo Alto,* 372 F. Supp. 647, 648 (N.D. Cal. 1974); *Brecciaroli* v. *Connecticut Commissioner of Environmental Protection,* 168 Conn. 349, 362 A.2d 948, 951-52 (1975); *Bureau of Mines* v. *George's Creek Coal and Land Co.,* 272 Md. 143, 321 A.2d 748 (1974); *Commissioner of Natural Resources* v. *S. Volpe & Co.,* 349 Mass. 104, 206 N.E.2d 666, 669-70 (1965); *Aronson* v. *Town of Sharon,* 346 Mass. 598, 195 N.E.2d 341, 345

(1964); *Penn Central Transportation Co.* v. *New York City,* 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), *aff'd,* 438 U.S. 104 (1978); *City of Austin* v. *Teague,* 570 S.W.2d 389, 393 (Tex. 1978).

The ineluctable logic and reasonableness of what the law has been is reflected in what the law should be as well. The American Law Institute advocates that:

> The particular circumstances of *each case* must be examined to see on which side of the regulation/taking line it falls. [cites omitted].
>
> This Code authorizes the payment of compensation in those cases in which the agency feels that the elimination of existing uses would impose too great a burden on the property owner. (§ 5-102). The Code makes no attempt to define the conditions under which compensation *must* [emphasis in original] be paid. *This is a basic constitutional issue that can be left to case-by-case decision* . . . . Under this Code a landowner who convinces a court that a regulation is unconstitutionally restrictive *may obtain compensation* or a declaration of the regulation's invalidity. (§ 9-111). ALI Model Land Development Code 155-56 (1976) (emphasis added).

Thus inverse condemnation actions clearly form an organic and inseparable part of the fifth and fourteenth amendments. The "authority is overwhelming" that confiscatory regulation gives rise to such relief.[11]

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[11] Berger, *supra* note 7, at 279. Professor Dunham, in a seminal article, reasons that the inverse condemnation remedy would check arbitrary land use regulation by striking a constitutional balance between public gain and private cost. Dunham, *supra* note 1. In addition to Berger and Dunham, two other noted land use law professors provide lucid discussions of the social need, as well as constitutional requirement, for compensatory regulation via the

Indeed, de facto taking claims have become so commonplace in American legal theory that courts have developed four sometimes overlapping approaches for supporting an award of damages for an unconstitutional taking of property. D. Godschalk, et al., Constitutional Issues of Growth Management 53-64 (rev. ed. 1979); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 Harv. L. Rev. 1165, 1183-1201 (1967); Sax, *Takings, Private Property and Public Rights,* 81 Yale L.J. 149, 151 (1971); *Developments in the Law—Zoning,* 91 Harv. L. Rev. 1427, 1462-1501 (1978). These approaches, or tests, are generally referred to as those for:

1) *physical invasion*—the elementary approach, represented by *Pumpelly* and *Griggs* v. *Allegheny County,* 369 U.S. 84 (1962) (airplane overflight case); but as stated in *Penn Central,* "we do not embrace the proposition that a 'taking' can never occur unless government has transferred physical control over a portion of a parcel." 438 U.S. at 123 n.25;

2) *diminution of value*—the approach exemplified by *Pennsylvania Coal,* in which a regulation that causes an excessive decline in a property's market value effects a taking;

3) *nuisance abatement*—if a regulation prevents a harm (abates a nuisance) no compensable taking occurs, but if it confers a benefit on the public then damages are awarded; this test, formulated in E. Freund, The Police Power § 511 (1904), finds examples in the *Agins*-like *Dahl, supra* (rezoning property to open space in order to avoid

inverse condemnation remedy. *See* Beuscher, *supra* note 7; Hagman, *Compensable Regulation: A Way of Dealing with Wipeouts from Land Use Controls?,* 54 U. of Det. J. Urb. L. 45 (1976).

cost of acquisition gives rise to constitutional "inverse condemnation" action), and *State* v. *Griggs,* 89 Ariz. 70, 358 P.2d 174 (1960) (a regulation that saves government money rather than protects the public health or safety from an injurious use of land is an unconstitutional taking without compensation; *cf. Cardon Oil Co.* v. *City of Phoenix,* 122 Ariz. 102, 593 P.2d 656 (1979)); and,

4) *balancing of interests*—the broadest test, this weighs the public good against private detriment, considering such factors as a regulation's duration and impact on use of land, the harm sought to be cured, and whether objective studies support the need and scope of the regulation; its essence, as Professor Michelman would emphasize, is that of "fairness" (*see, e.g., Brecciaroli, supra,* and *Village of Willoughby Hills* v. *Corrigan,* 29 Ohio St.2d 39, 278 N.E.2d 658 (1972)).

The stunningly absolutist approach adopted by the lower court, however, patently denies any constitutional analysis and thereby begs the taking question before it can be rightfully posed. Since the 1960's, land use law has become far more than planning, zoning, subdivision, and urban renewal, and now encompasses more complex issues of environmental regulation, historic preservation, transfers of development rights, growth management, and all facets of how land is to be used, developed, and controlled, balancing private rights with public needs. Turning the salient constitutional issue of differing applications of land use regulation into an either/or contest unnecessarily belittles both the Constitution and conservation. As the Supreme Judicial Court of Massachusetts so presciently observed:

> The [government] argue[s] as though all that need be done is to demonstrate a public purpose

> and then no regulation in the interests of conservation can be too extreme. . . An unrecognized taking in the guise of regulation is worse than confiscation. . .
>
> In this conflict between the ecological and the constitutional, *it is plain that neither is to be consumed by the other. Commissioner of Natural Resources* v. *S. Volpe & Co.*, 349 Mass. 104, 206 N.E. 2d 666, 671 (1965) (emphasis added).[12]

Compensatory takings thus occur primarily in two critical situations: whenever a zoning ordinance precludes reasonable use of a property, and whenever a government places an undue and uncompensated burden on an individual landowner in order to achieve a public good. 1 A. Rathkopf, *supra. Agins,* on its face, includes classic taking issue elements:[13] a report prepared for the city as part of its planning process noting the suitability for acquisition of the Agins'

[12] For discussions of how highly questionable zoning and land use practices are increasingly being clothed in the respectable language of environmental protection, *see* M. Brooks, Housing Equity and Environmental Protection: The Needless Conflict 2 (1976); R. Nelson, Zoning and Property Rights—An Analysis of the American System of Land-Use Regulation 162-63 (1977).

[13] The issue raised by this appeal certainly is not limited to cases that never reach the trial stage but nonetheless make the requisite taking allegations. A parallel appeal (No. 79-678) has been filed in this Court in which, after trial, an inverse taking was found and affirmed and damages awarded (*San Diego Gas & Electric Co.* v. *City of San Diego,* 81 Cal. App. 3d 844, 146 Cal. Rptr. 103 (1978)); on appeal, the state supreme court retransferred the case back to the lower appellate court in light of the *Agins* opinion, and the appellate court then reversed its prior decision. No. 16277 (4th D.C.A. Cal., June 26, 1979), hearing denied, Cal. Sup. Ct., Aug. 22, 1979. The *San Diego* case, like *Agins,* involved downzoning and adoption of an open space element in a general plan.

property for open space, the rezoning of the property to a lower density called "residential planned development and open space zone," and the filing, then subsequent abandonment, of an eminent domain action against the property. Compensatory takings in the land use context have been found or permissibly alleged time after time in cases with elements such as these. Well known examples from across the nation include:

Zoning—Sixth Camden Corp. v. *Township of Evesham,* 420 F. Supp. 709 (D.N.J. 1976) (inverse condemnation action under fifth and fourteenth amendments); *Dahl, supra* (inverse condemnation, open space rezoning); *Klopping* v. *City of Whittier,* 8 Cal. 3d 39, 500 P.2d 1354, 104 Cal. Rptr. 1 (1972) (inverse condemnation); *Petersen* v. *City of Decorah,* 259 N.W. 2d 553 (Iowa App. 1977); *Aronson, supra; Morris County Land Improvement Co., supra* (to keep land in substantially natural state); *Village of Willoughby Hills, supra;*

Subdivision, development—Gordon v. *City of Warren,* 579 F.2d 386 (6th Cir. 1978); *Hotel Coamo Springs, Inc.* v. *Hernandez Colon,* 426 F. Supp. 664 (D.P.R. 1976); *Estuary Properties, Inc.* v. *Askew,* No. II-419 (1st D.C.A. Fla., Dec. 17, 1979); *Ventures in Property I* v. *City of Wichita,* 225 Kan. 698, 594 P.2d 671 (1979) (inverse condemnation); *Lomarch Corp.* v. *Englewood,* 51 N.J. 108, 237 A.2d 881 (1968) ("temporary taking"); *City of Austin* v. *Teague,* 570 S.W. 2d 389 (Tex. 1978) (inverse condemnation, denial of permit to gain scenic easement); *San Antonio River Authority, supra* ("temporary taking");

Planning—Washington Market Enterprises, Inc. v. *City of Trenton,* 68 N.J. 107, 343 A.2 408 (1975);

Police power combinations—Donohoe Construction Co., supra (planning, zoning, subdivision, building permit actions); *Sanfilippo* v. *County of Santa Cruz,* 415 F. Supp. 1340 (N.D. Cal. 1976) (inverse condemnation, planning and zoning); *Peacock* v. *County of Sacramento,* 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969) (inverse condemnation, planning, zoning, and subdivision actions);

Other police power regulations—Pete v. *United States,* 209 Ct. Cl. 270, 531 F.2d 1018 (1976) (inverse condemnation, ban of barges within federal park to maintain natural state); *Bydlon* v. *United States,* 146 Ct. Cl. 764, 175 F. Supp. 891 (1959) (ban of low-level air travel over national forest to maintain natural state); and,

Eminent domain (dilatory or abandoned)—Thomas W. Garland, Inc. v. *City of St. Louis,* 596 F.2d 784 (8th Cir. 1979); *Richmond Elks Hall Association* v. *Richmond Redevelopment Agency,* 561 F.2d 1327 (9th Cir. 1977) (inverse condemnation); *Foster* v. *City of Detroit,* 405 F.2d 138 (6th Cir. 1968); *Madison Realty Co.* v. *City of Detroit,* 315 F. Supp. 367 (E.D. Mich. 1970); *Haczela* v. *City of Bridgeport,* 299 F. Supp. 709 (D. Conn. 1969); *Benenson* v. *United States,* 212 Ct. Cl. 375, 548 F.2d 939 (1977) (inverse condemnation); *Drakes Bay Land Co.* v. *United States,* 191 Ct. Cl. 389, 424 F.2d 574 (1970); *Hardesty* v. *State Roads Commission,* 276 Md. 25, 343 A.2d 884 (1975) (scenic easement); *Lincoln Loan Co.* v. *State Highway Commission,* 274 Or. 49, 545 P.2d 105 (1976); *Miller* v. *City of Beaver Falls,* 368 Pa. 189, 82 A.2d 34 (1951); *In re*

Cornell Industrial Electric, Inc., 19 Pa. Commw. 599, 338 A.2d 752 (1975).

The Supreme Court opinions in *Pumpelly, Pennsylvania Coal,* and *Penn Central* are major pronouncements of the unwavering constitutional principle that private property cannot be appropriated via exercise of the police power without payment of just compensation. *Kaiser Aetna* pellucidly affirms the principle. The above litany of federal and state cases bears that point out as well as the more fundamental point that the fifth and fourteenth amendments insure, at minimum, *the right to make a claim for a taking of property.*

> Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right. . . . In fact, a *fundamental interdependence* exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. *That rights in property are basic civil rights has long been recognized. Lynch* v. *Household Finance Corp.,* 405 U.S. 538, 552 (1972) (emphasis added).

The severe and singular approach adopted in *Agins,* denying for the future any chance for a case-by-case taking analysis, flies in the face of both the Constitution and Supreme Court rulings thereunder. At its heart, the Constitution seeks that necessary balance between individual rights, personal and property, and public necessity. That is the essence of fairness, and, at bottom, the value of constitutional scrutiny.

III. The Decision of the Court Below Violates the Supremacy Clauses of the Federal and State Constitutions.

Under the supremacy clauses of the United States and California Constitutions,[14] the courts are bound by the terms of the fifth and fourteenth amendments. *See, e.g., Cooper* v. *Aaron,* 358 U.S. 1 (1958); *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137 (1803); 1 T. Cooley, Constitutional Limitations 25 (8th ed. 1927). No ruling of a state court can negate the meaning of the federal Constitution's provisions as interpreted by this Court. 16 Am. Jur. 2d *Const. Law* §§ 70, 78 (1979). Yet, as the above arguments have shown, the court below has not only greatly misinterpreted the Constitution's just compensation clause but has also plainly ignored the many rulings of this Court regarding compensatory de facto takings and the necessity for case-by-case factual inquiries. Having based its decision upon the Constitution, the court below should be held to it.

CONCLUSION

For the above reasons, the Court should reverse the decision of the Supreme Court of California.

Respectfully submitted,

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February 1980

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[14] "This Constitution . . . shall be the supreme law of the land; and the judges in every State shall be bound thereby . . . ." U.S. Const. art. 6. ". . . [T]he United States Constitution is the supreme law of the land." Cal. Const. art. 3, § 1.

Supreme Court, U. S.
FILED
FEB 21 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,
Appellants,

vs.

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Appellee.

Appeal From the Supreme Court of California.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,
Appellants,

vs.

CITY OF TIBURON,
Appellee.

Appeal From the Supreme Court of California.

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT

INTEREST OF AMICI CURIAE

This brief is respectfully presented by a number of experienced California attorneys who concentrate their practice in the fields of eminent domain and land use regulation primarily (but by no means exclusively) representing private property owners. *Amici* are more fully identified in Appendix B to this brief. All are presently involved in cases squarely presenting issues and questions raised in the instant case. In many of these cases, *Agins v. Tiburon*[1] has been urged as dispositive.

[1](1979) 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 104.

SUMMARY OF ARGUMENT

A. Focus On Questions Of Policy And Equity.

This brief will not extensively address the particular facts of the present case, but will rather focus on significant policy and equity questions presented by the challenged opinion of the California Supreme Court.

It is respectfully, and most vigorously, submitted that the Supreme Court of California has construed the just compensation clause of the Fifth Amendment (binding against states and local governments under the selective incorporation doctrine through the Fourteenth Amendment) in a manner that not only creates a substantial specific injustice in this case, but also divests that clause of any real protective quality and renders it a nullity in California in land regulation situations.

B. Abdication Of Obligation To Enforce Constitutional Right.

The majority opinion evidences a philosophic regression, not of mere years or decades, but back to the days of divine right of sovereign power of the 17th and 18th centuries. In its zeal to protect planners and regulators, the court has restricted the property owner to invalidation, which is represented as a remedy, but is in fact (in all but a few special situations) a non-remedy with no curative potential whatsoever.

The California Supreme Court fell into multiple error in the opinion. The brief will focus on two distinct concepts expressly set forth therein. They are:

(1) *the court's radical, virtually unprecedented conclusion that under no circumstances is damages an appropriate remedy for excessive land use regulation.* This is set forth at 24 Cal.3d at 269-270 in this language:

> "[A]lthough a landowner so aggrieved may challenge both the constitutionality of the ordinance and the manner in which it is applied to his property by seeking to establish the invalidity of the ordinance either through the remedy of declaratory relief or mandamus, he may not recover damages on the theory of inverse condemnation."

See Argument, Point I, *infra.*

(2) *the court's holding that this exclusive remedy of invalidation is available only in those few extreme cases in which governmental regulatory act results in a virtual destruction of all use and value of property.* This is thus articulated at 24 Cal.3d at 277:

> "[W]e hold that a zoning ordinance may be unconstitutional and subject to invalidation only when its effect is to deprive the landowner of substantially all reasonable use of his property."

See Argument, Point IV, *infra.*

It is recognized that this case presents a number of pleading and procedural questions which may prove dispositive. *Amici* urge, however, that the court address the language here quoted, which has extraordinary potential for precedential mischief.

The constitutional rights to just compensation and due process are of high dignity and are not to be avoided by emasculating redefinition. Both the letter and spirit should

be generously implemented. The economic, social and political costs of failing to do so (some of which are quite subtle) are awesome. See Argument, Point IV, *infra.*

When the two concepts reflected in the language above quoted, are meshed with other concepts which are now invading California decisional law, the resulting mix compounds the problem of California property owners in securing justice in disputes with regulating entities. Of these remaining concepts, fairly comprised in these two primary concepts and equally at odds with logic, fairness and the law of this court, one of the most troublesome is that public use is to be narrowly defined in terms of the expressed intent of the regulator, and limited to situations of formal acquisition, affirmative occupation and physical invasion. This court should reaffirm that the effect on the property owner controls, rather than the incantation of the regulating body, or the nature of the mechanism of impairment. See Argument, Point IV. E., F., *infra.*

C. Decision At Odds With All Authority.

In holding that under no circumstance can an owner of a property interest impaired by oppressive regulation secure damages in inverse condemnation, the California court has propounded a maverick decision, at odds with both the express rulings and the texture of the tradition of this court, as well as virtually all remaining American jurisdictions and, indeed, its own earlier rule of law. See Argument, Point II., *infra.* The decision is also at odds with the great weight of scholarly authority in point, which reflects decades of thoughtful analysis. See Argument, Point V., *infra.*

D. Environmental Protection v. Individual Rights: A False Dilemma.

The supposed dilemma between individual rights in property is a phantom dilemma, presenting a false choice. Society can and should protect both our ecological system and human rights. See Argument, Point III.

E. Fundamental Question Presented: Just Cost Distribution.

The problems that challenged the California courts in *Agins v. Tiburon* have bedeviled courts throughout this nation in recent years, as they have tried to deal with an explosion of new, massive and innovative land use controls and regulations, which have their ultimate source in the awakening of the American people to the necessity of conserving and marshaling our finite resources in the interest of future generations. No party in this action is challenging the soundness of these compelling goals. They deserve to be given full consideration in societal planning, in appropriate balance with social and economic factors. The fundamental question *Agins v. Tiburon* raises is whether the *costs* of these land use and preservation devices (and these costs are substantial, direct and indirect, open and hidden) should be socialized, i.e., distributed fairly through that the benefiting public, or whether they should simply be randomized, i.e., imposed upon individuals who simply happen to own the land in the path of a particular project or scheme. *Amici* respectfully submit that the legal and social consequences of anything less than full and fair cost distribution are ultimately unthinkable.

F. A Suggested Approach.

Amici respectfully offer an integral approach to resolution of land regulation cases which arise at the interface of the police power and the just compensation clause. (Argument, Point IV. F., *infra*) This suggested approach is based on fairness and consideration of reasonable private expectations and public need. A two-step analysis is tendered to sever consideration of the threshhold power to regulate from the question of economic consequences of regulation.

G. Need For Resolution By This Court.

The California Supreme Court has indeed, as the dissenting opinion notes, "abdicate[d its] responsibility to give meaning and substance to constitutional mandate."[2] The problem this opinion creates does not lend itself to political solution, and is within the sole province of this honorable court to remedy. See Argument, Point III. F., *infra.*

ARGUMENT

I

THE INVALIDATION NONREMEDY: RECOURSE LEFT TO PROPERTY OWNERS IS TYPICALLY ILLUSORY, WITHOUT REAL SUBSTANCE.

A. The Need For Flexibility.

1. The Infinite Variety.

Contemporary land use controversies arise in a myriad of fact situations. While the basic conceptual dictates of the just compensation and due process clauses of the

[2]24 Cal.3d at 284.

United States Constitution (and derivative provisions in state Constitutions) are firm, courts have traditionally approached these cases on what might be fairly described as an *ad hoc* basis. There is a sound reason for this; a precedent or maxim that brings poetic justice in one instance often works chaos in the next.

This versatility has reduced predictability, but has had a salutory effect on justice. It should be preserved.[3] Limiting relief to invalidation, as the California Supreme Court here proposes, would unduly shackle courts. It can only disturb the vital and fragile balance between the governors and the governed which is so essential to the health of the body politic, and gestate repeated injustice.

2. The Futility of Invalidation After Damage Done.

Invalidation really only works where a court reviews a regulatory act *prior* to the time the act has adversely impacted private rights in property. Invalidation at that point gives the regulating entity an effective option: it can either abandon the regulatory scheme, or if the ends are of sufficient importance, modify the regulation to provide for fair compensation. If the property owner is awarded appropriate litigation costs and fees, he also emerges whole.

[3]The claim in Appellee's Motion to Dismiss or Affirm that appellants urge that "inverse condemnation is constitutionally the only required remedy for excess land use regulation" (Motion, p. 16) represents such an egregious mischaracterization of appellant's consistent position as to challenge credulity. It is the California Supreme Court which has chosen to constrict and limit the tools available to courts in dealing with oppressive land use regulation, and the City of Tiburon defends this position. It is the property owners who argue for breadth and flexibility to permit courts to tailor remedies to facts to insure substantive justice.

In stark contrast, if a court reviews a regulation *after* it has already had the effect of taking or damaging private rights in property, invalidation is largely beside the point. The damage has been done. The entity has *completed* a violation of the constitutional guarantees, which violation is not cured by the court merely informing the entity of that fact. *Only just compensation can cure the violation.* In this situation, a property owner does *not* "transmute an excessive use of the police power into a lawful taking for which just compensation in eminent domain must be paid." 24 Cal.3d at 273. The *entity* has, through an excessive use of police power, itself created a situation in which impairment is a *fait accompli.*

The remainder of this point will demonstrate why, in the real world of contemporary California land use regulation practice, invalidation is basically a phantom remedy, with no real capacity for relief. Because *Agins v. Tiburon* arose in California and because *amici* are most familiar with California practice, statutes and practices herein discussed will typically be California statutes and practices. This by no means suggests, however, that these are unique to this jurisdiction. Comparable statutes and practices have pervasive distribution throughout the United States.

B. The Finality Problem.

1. The Yo-Yo Game.

A major flaw in restricting relief from unconstitutional regulation to invalidation is that such relief lacks finality in any real sense. The court tells the regulating body of its

excess, at which point the entity typically becomes free to try again.[4]

It works something like this. Assume that, against all odds, a property owner is able to persuade a court to invalidate a regulation. The supposedly defeated entity (or an *amicus* appearing in its support) then advises the court that it cannot simply correct the defective ordinance. All the court can do is send the entire package back to the very entity which caused all the trouble in the first place, for it to therein further exercise its "discretion".

At this point, the parties found find caught up in what is sometimes called the yo-yo game. If a reviewing court, for example, strikes down a regulation which permits one residential unit to be built for each ten acres, the local entity on remand passes a new regulation permitting one unit to be built for each eight acres. If this is also struck down, the entity then enacts an ordinance permitting one

---

[4]This is the meaning of this language from former Thousand Oaks' City Attorney, James Longtin, quoted (pp. 28-29) in appellant's Jurisdiction Statement:

> "If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent Supreme Court case of *Selby v. City of San Buenaventura,* 10 C.3d 110, appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again." Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation),* 38B NIMLO Municipal Law Review 175, 192 (1975)."

To give this invitation to abuse the weight it deserves, it should be noted that Mr. Longtin is no garden variety ex-City Attorney, but is the author of *California Land Use Regulations* (Local Government Publications 1977), a comprehensive (800 pages plus) law and practice book in wide usage in California, particularly in government offices.

unit for every twelve acres, or every six acres, or whatever. The object of the game is to exhaust the property owner's funds, or patience, or both. Attrition inevitably takes its toll, and the regulators, who may have enacted a series of extravagantly unconstitutional regulations and decisively lost every court clash, prevail. It is a game a property owner cannot win. It is a game he should not have to play. It is so cynical and surrealistic that it invariably leaves a distaste for law and institutions of justice.

2. An Invitation To Abuse.

It is no answer that, as the City contends in its Motion to Dismiss or Affirm herein on file (p. 8), "[t]his case does not involve abuse by government agencies in continually adjusting their positions following adverse court decisions against them with the intent of continuing to frustrate an owner in accomplishing any reasonable use of land." The point is that the opinion in *Agins v. Tiburon* is a clear invitation to prospective abuse. When an entity official realizes that the worst thing that can happen when a blatantly unconstitutional regulation is promulgated is that a reviewing court may some time in the future inform it that such regulation is in fact unconstitutional, there is no disincentive to act abusively. In this context, it should be borne in mind that during the period a regulation (valid or otherwise) is in effect, an entity is accomplishing the purpose the regulation was designed to accomplish. A series of invalid regulations, enacted *seriatim,* may bring the full benefit of a valid regulation.

3. "Trust Us".

Challenged by this scenario of the possibility of unchecked abuse, governmental officials sometimes respond that, after all (1) governments are instituted for the benefit of the public; and (2) its representatives are public servants who will, of course, voluntarily and invariably deal fairly with citizens. Without questioning the good faith and bona fides of any public official, experience has repeatedly taught that an ideologue in a position of authority zealously dedicated to the preservation of the environment, or the quality of life, or some other worthwhile end, may lose perspective as to means with unfortunate constitutional consequences to those being regulated.

C. How Do You Invalidate a Course of Conduct?

A practical infirmity in the invalidation remedy lies in the fact that so few of the cases that are litigated involve "pure" regulation. More typically, a case will present a course of entity conduct which may *include* regulation, but typically other factors as well: moratoriums, bond issues, extensive delays, broken promises, demands for unreasonable dedication, repeated false starts, trespass, chilling publicity, acquisitive intent, bad faith, or whatever.[5] *Agins v. Tiburon* is not atypical in this aspect.

Obviously, invalidation is not an adequate remedy in these situations. How do you "invalidate" delay? How do you "invalidate" publicity that renders property unsaleable? How do you "invalidate" bad faith? And what

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[5]It must be remembered that the various acts and events in a course of conduct must be considered cumulatively, and not separately. See *Amen v. City of Dearborn* (E.D. Mich. 1973), 363 F.Supp. 1267, 1277-1278.

if (as is often the case) the course of conduct includes *no* formal regulation subject to invalidation?

D. The Limited Scope.

There is another serious flaw in the invalidation remedy. When California property is subjected to severe regulation that (1) has been drafted and executed according to accepted procedural standards, (2) serves some ostensible public purpose, (3) imposes restrictions bearing some arguable relationship to this purpose, and (4) preserves that minimal utility in the owner (five percent? three percent? one percent?) so that the regulation does not "deprive the landowner of *substantially all* reasonable use of his property"[6] (24 Cal.3d at 277), its owner not only has no adequate remedy, he has *no remedy whatsoever*. See Point IV, *infra*. For a dramatic illustration of how *Agins* made a bad situation worse, compare *Toso v. City of Santa Barbara* (1979), 88 Cal.App.3d 654, 151 Cal. Rptr. 912, with the post-*Agins* opinion in the same case (2 Civ. 49261; Feb. 6, 1980).

E. Even If You Win, You Lose.

Even in the unlikely event the landowner clears all these hurdles and obtains satisfactory substantive relief through invalidation, he will not be made whole,[7] inasmuch as he has been ground through the legal mill with

[6]In weighing each of these factors, every intendment and presumption is typically accorded the regulators; a California court is most reluctant to "substitute its judgment". See, e.g., quote from *Morse v. County of San Luis Obispo* (1967), 247 Cal.App.2d 600, 55 Cal.Rptr. 710, in Footnote 3 of appellee's Motion to Dismiss or Affirm.

[7]The unequivocal constitutional standard (*under both United States and California law*) is that he be made whole. *United States v. Miller* (1943), 317 U.S. 369, 373; *People v. Lynbar, Inc.* (1967), 253 C.A.2d 870, 880, 62 Cal.Rptr. 320; *Los Angeles v. Harper* (1934), 139 C.A. 331, 334, 33 P.2d 1029.

its attendant costs in time, money, and loss of use of property.[8]

In inverse condemnation actions in California, a victorious property owner who has suffered a taking of any interest in real property, is awarded "reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal and engineering fees, actually incurred . . ." California Code of Civil Procedure § 1036. The successful invalidator gets no such benefit.

F. The Reluctant Witness.

There is one more powerful, albeit reluctant testimony to the essential worthlessness of the invalidation remedy in California.

If this Court had the leisure to review the entire body of advocacy literature filed in California land use cases in recent years, one very illuminating fact would emerge in bold relief. Attorneys who have appeared to defend the interest of property owners invariably dislike invalidation, and the more experienced and sophisticated they are, the greater is this dislike. The champions of invalidation have been public attorneys *who represent those very entities against whom this remedy is supposed to be efficacious*. This is very much like wolves instructing shepherds on the subject of sheep protection. This is highly revealing, but is in no sense paradoxical. Entity attor-

[8]Representative of an impressive array of cases in which a property owner was visited by foreclosure on the subject property, or actual bankruptcy, during the course of litigation, are *Jacobson v. Tahoe Regional Planning Agency* (9th Cir. 1978), 566 F.2d 1353; and *Southpark Square Ltd. v. City of Jackson* (5th Cir. 1978), 565 F.2d 338.

neys have huckstered this remedy for the exact reason counsel for property owners have adamantly opposed it. Both know full well that it is a sham.

G. A Comprehensive Guide to California Invalidation Cases.

California is the most populous state in the Union. Its lands are among the most intensely regulated, and its citizens certainly among the most litigious. If invalidation were a satisfactory remedy for abusive use of government regulatory power, it might be anticipated that the main problem in familiarizing oneself with the law would be one of selection, i.e., sorting through and choosing from the abundance of decisions in which land use regulations of California governmental entities have been invalidated on the ground of confiscation.

But, this anticipation would be wide of the mark. If a species of humor which peaked a decade ago were revived, "A Comprehensive Guide to California Invalidation Cases" would qualify for inclusion in the library of the world's shortest books. The last reported cases in California in which threat of confiscation lead to invalidation are *Hamer v. Ross* (1963), 59 Cal.2d 776, 31 Cal. Rptr. 335, 382 P.2d 375, and *Kissinger v. Los Angeles* (1958), 161 Cal.App.2d 454, 327 P.2d 10. For all interests and purposes, California courts ceased to invalidate a decade or more before the Supreme Court of California went public with its ultra-stringent test in *H.F.H. Ltd. v. Superior Court* (1975), 15 Cal.3d 508, 125 Cal.Rptr.

365, 542 P.2d 237, cert. den. 425 U.S. 904,[9] and *Agins v. Tiburon.*[10] See Point IV, *infra.* Since *Hamer v. Ross,* vir-

[9]*H.F.H., Ltd. v. Superior Court* is the spiritual ancestor of *Agins v. City of Tiburon.* During its pendency, *H.F.H., Ltd. v. Superior Court* generated a near avalanche of *amicus* briefs, on both sides, it being widely anticipated that the court's decision would be of consequence. *H.F.H., Ltd. v. Superior Court* is cited repeatedly in both the majority and dissenting opinions in the case at bar. It will also be the subject of frequent reference in this brief.

In contrast to *H.F.H., Ltd. v. Superior Court, Agins* seemed during its pendency to fit well within the ambit of existing law, and prompted very limited *amicus* participation. The use of the decision as the occasion for a major *pronunciamiento* caught the land use bar somewhat unaware. Thus the expanded perception mentioned on p. 6, fn. 6, of appellee's Motion to Dismiss or Affirm. Any expansion of issues (and the expansion, if any, is only of pre-existing issues; the basic issues were raised at the trial level) is traceable to the opinion itself and not to counsel for appellants.

Perhaps the most remarkable thing about the *Agins* opinion is that nothing therein (except the dissent) suggests cognizance of its revolutionary nature, or its inconsistency with the law of other American jurisdictions, the court's own prior announcements, and the bulk of respected scholarly opinion on point.

In *Agins v. Tiburon,* the Supreme Court reversed a Court of Appeal decision not found in the official reporter because of California law under which the Supreme Court opinion totally supersedes the Court of Appeal opinion (California Rules of Court 976, 977), which thereafter may be cited for only limited purposes. The Court of Appeal opinion in this case is reprinted at 145 Cal.Rptr. 476. *Amici* agree with the result of this opinion (which now has no force of law), but not necessarily with all of the reasoning therein.

[10]This posture is atypical for the California Supreme Court. It has an honored history of enlightened and sensitive decisions enlarging individual freedom and expansively interpreting constitutional guarantees against the threat of oppression by the state or some other powerful institution. See, e.g., *Vasquez v. Superior Court* (1971), 4 Cal.3d 800, 94 Cal.Rptr. 796, 484 P.2d 964; *Dillon v. Legg* (1968), 68 Cal.2d 728, 69 Cal.Rptr. 72, 441 P.2d 912. *Holtz v. Superior Court* (1970), 3 Cal.3d 296, 90 Cal.Rptr. 345, 475 P.2d 441, is a very progressive and fair-minded inverse condemnation (physical damage) case (see particularly 3 Cal.3d at 304). *Agins v. Tiburon* is against that tradition. The court here adopts a regressive approach, constricting individual rights and narrowly limiting constitutional guarantees. It does not look forward, but back toward the era when people held liberty, property, and even life, at the whim of the sovereign.

tually a whole generation has passed, and the environmental movement has come of age.

This court should not be misled in its deliberations by citations to invalidation cases from other jurisdiction, notably New York. What happens in these states has no relationship to reality in California. The New York courts really and truly *do* invalidate regulations, and do so with frequency and vigor. Courts in California do not. If past history is any guide, what the California Supreme Court is saying when it articulates that invalidation shall be the exclusive remedy for excessive regulation is that there shall be no remedy at all. The ostensible remedy is a paper tiger, and regulatory entities are given *carte blanche*.[11]

[11]A particularly readable account of this reluctance of California courts to rule against regulating government entities in land use cases, concentrating on one governmental entity, the California Coastal Commission, is found in Berger, *You Can't Win Them All —Or Can You?* 54 Cal. State Bar Journal 16 (1979). This Commission was established by the California Legislature and given sweeping powers (California Public Resources Code §§ 30300, *et seq.*) to fulfill its charge of protecting the precious California coastline from erratic development or exploitation. The need for such protection is clear and some real accomplishment by the Commission (there are really a number of Commissions, one central and several subordinate local bodies) are indisputable: nonetheless, erratic practice and the Commission's dedication to expedited and abbreviated proceedings and noncompensable regulation have generated substantial and growing criticism, including a charge by some of its more vocal critics that it has demonstrated a sensitivity to due process that would have embarassed Genghis Khan. Mr. Berger's thesis, argued with impressive scholarship and trenchant wit, is that neither logic nor equity nor precedent have been permitted to stay or deter California courts in their appointed rounds of validating every regulatory enactment of the Coastal Commission, no matter how oppressive or whimsical.

II

THE DECISION OF THE CALIFORNIA SUPREME COURT IN AGINS V. TIBURON, ABOLISHING THE REMEDY OF MONETARY DAMAGES IN OPPRESSIVE LAND USE REGULATION CASES IS CONTRARY TO FIRMLY ESTABLISHED DECISIONAL PRECEDENT OF THIS COURT AND OF THE REMAINING AMERICAN JURISDICTIONS.

A. Agins Ignores Prior Decisional Law of This Court.

In holding that excessive land use regulation can never, no matter how irrational or oppressive, create a cause of action for damages in inverse condemnation, the California Supreme Court purported to interpret not only the just compensation clause in Art. 1, § 19 of the California Constitution, but also the just compensation clause of the Fifth Amendment of the Constitution of the United States. In this latter aspect, it boldly attempted to overrule firmly established precedent of this court.

The landmark case of *Pennsylvania Coal v. Mahon* (1922), 260 U.S. 393, is the decision most often cited for the principal that the difference between non-compensable regulation and compensable impairment is quantitative and not qualitative, depending upon the substance of the burden visited and not the label appended to the impairing mechanism. The thrust of this language from *Pennsylvania Coal* is clear:

> "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amend-

ment. . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States. . . . *The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.*" 260 U.S. at 415. (Emphasis added.)

Justice Holmes further stated that the question of whether a regulation goes too far is "a question of degree —and therefore cannot be disposed of by general propositions." 260 U.S. at 416. The equitable core of the opinion is thus articulated:

> "*We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.*" 206 U.S. at 416. (Emphasis added.)

The California Supreme Court shunted *Pennsylvania Coal* aside in *Agins*, asserting that since in *Pennsylvania Coal* no monetary damages flowed to the aggrieved party (none were asked), this court could not have really meant what it said. 24 Cal.3d at 274. This is a most flimsy thread on which to hang a rejection of unequivocal language of a superior tribunal.

But at least *Pennsylvania Coal* was mentioned by the *Agins* majority. Other opinions of this court, consistently holding to the same effect, were not.

Representative of these other case is *United States v. Central Eureka Mining Co.* (1958), 357 U.S. 155, wherein it was stated:

> "We have recognized that action in the form of regulation can so diminish the value of property as to constitute a taking." 357 U.S. at 168.[12]

Even where, on particular facts, a property owner is ultimately unsuccessful, this court has carefully reaffirmed its philosophic commitment to the *Pennsylvania Coal* doctrine, as in *Goldblatt v. Town of Hempstead* (1962), 369 U.S. 590, 594:

> "This is not to say, however, that governmental action on the form of regulation cannot be so onerous as to constitute a taking *which constitutionally requires compensation.*" (Emphasis added.)

In *Agins*, the California Supreme Court thus said precisely what the United States Supreme Court insisted is not to say.

More recent cases, with diverse results, which have reaffirmed the *Pennsylvania Coal*[13] principle are *Penn Central*

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[12]The philosophy underlying *Pennsylvania Coal*, fair distribution of the costs of public improvements among those benefiting thereby, has often been restated by this court.

From *United States v. Willow River Power Company* (1945), 324 U.S. 499, 502:

> "The Fifth Amendment . . . undertakes to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project."

[13]*Pennsylvania Coal* was not the first case of this court to articulate its principle, which has explicity or implicity quickened just compensation decisions virtually since the founding of the Republic. It pervades, for example, *Pumpelloy v. Greenbay and Mississippi Canal Co.* (1872), 13 Wall. 166, 80 U.S. 557.

Transportation Co. v. City of New York (1978), 438 U.S. 104, and *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency* (1979), 440 U.S. 391.[14]

B. Opinion Without Parallel or Precedent.

Neither the City of Tiburon nor any *amicus* appearing on its behalf invited the attention of the Courts below to a case from the supreme tribunal of any other American jurisdiction holding that the inverse condemnation damages remedy is simply not available in a zoning or other regulation case. This was not due to oversight; to our knowledge, *there exists no such case.*[15] There are cases holding invalidation to be a suitable remedy, and cases in New York and some other jurisdictions holding it to be a preferred (and even strongly preferred) remedy, but no Supreme Court case from any state but California holds invalidation to be an *exclusive* remedy.[16]

Thus, California is at odd not only with the United States Constitution, but also with *all* sister jurisdictions.[17]

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[14]*Lake Country Estates* must be read in conjunction with *Jacobson v. Tahoe Regional Planning Agency* (9th Cir. 1977), 566 F.2d 1353, a related case which makes clear its consistency with the *Pennsylvania Coal* line.

[15]Some recent cases from other jurisdictions hold damages to be the appropriate remedy. See Jurisdictional Statement, pp. 19-22, and postdating the filing of that Statement) *Estuary Properties v. Askew* (1980) .... Fla. ....

[16]There is at least one case, however, from an intermediate appellate in another state so holding. *Davis v. Pima County* (1978, Ariz. App.), 121 Ariz. 343, 590 P.2d 459, cert. den. (1979), ... U.S. .... [61 L.Ed. 312]. *Davis v. Pima County* relied almost exclusively on *H.F.H., Ltd. v. Superior Court, supra.*

[17]This brief is not a proper vehicle for an extended speculation as to how California got out of touch with the rest of the country. Citizen movements to limit government taxes and expenditures, of which Proposition 13 is only the most famous, obviously played a role. They do not offer the whole answer, since they are predated

(footnote continued next page)

In *Agins v. Tiburon,* the court also repudiated *sub silentio* its own prior rule of law:

> "While the police power is very broad in concept, it is not without restriction in relation to the taking or damaging of property. When it passes beyond proper bounds in its invasion of property rights, it in effect comes within the purview of the law of eminent domain and *its exercise requires compensation." House v. Los Angeles County Flood Control District* (1944) 25 Cal. 2d 384, 389; emphasis added.

In 1975, the Texas Supreme Court stated that "[it] is now *universally recognized* that acts short of actual physical invasion, appropriation or occupation can amount to a compensable taking, and that *government restrictions on the use of property can be so burdensome as to constitute a compensable taking". San Antonio River Authority v. Garrett Brothers* (Tex. 1975), 528 S.W.2d 266, 273; emphasis added. A rule of law *universally* recognized only five years ago is thus no longer recognized in California.

C. The Police Power-Eminent Domain Dichotomy and How It Grew.

1. Introduction.

The issues presented in this case, like the issues in all cases, take on particular clarity when seen in their full historical context. With the court's indulgence, a concise

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by the earliest of the restrictive decisions. Physical isolation imposed by the Sierra Nevadas and Death Valley may be a factor. Of obvious significance is the fact that environmental organizations (which wield great power in California), the Office of the State Attorney General, and public interest and quasi-public interest law firms have repeatedly appeared as *amici* in California courts advocating noncompensable regulation and curtailment of individual rights in property.

summary of that context will here be attempted. This history centers at the interface of the just compensation guarantee in the Fifth Amendment and that attribute of sovereignty called police power.

2. Police Power as Regulator of Morals.

Anglo-American jurisprudence, and the law of this court, have historically recognized two different types of cases involving state interference with property interests of private parties, each presenting its own equitable ramifications. The *first* is the situation where the owner is forced to sacrifice his property for a road, schoolhouse, etc., wherein compensation is obviously appropriate to distribute the cost. The *second* is the situation in which the property owner is engaged in some activity on his property which is harmful or offensive to other citizens in the community. There are clear punitive overtones in the older cases requiring correction without compensation situations which externalize harm beyond the borders of the property. The community was policing the behavior of its citizens, and the power by which it did this became known as the police power.[18]

The police power is still exercised prohibitively in this type of situation:

> "The police power may be loosely described as the power of the sovereign to prevent persons under its jurisdiction from conducting themselves or using their property to the detriment of the general welfare." 1 Nichols, *The Law of Eminent Domain* (Rev. 3d Ed. 1974) § 1.42.

[18]The California Supreme Court early stated that "[t]he police power of the city refers rather to the regulation of its morals than its property," referring to, among other sources, § 162 of Blackstone's commentaries. *Los Angeles v. Los Angeles City Water Company* (1882), 61 C. 65, 10 P. 491.

Up until the late 19th and early 20th Century, the police power was used coercively only in situations where the proscribed conduct was *malum in se*.[19]

As the police power developed, scholars began to clothe it with conceptual substance, and to explore its relationship with the eminent domain power. A classic formulation, often quoted, is that of Professor Ernst Freund:

> ". . . it may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful." Freund, *The Police Power*, § 511 (1904).

Thus, the idea of noncompensability for police power exercise was, when it became engrafted onto the corpus of the law, perceived as an appropriate response to antisocial activity of a public nuisance nature, and grounded in conscious policy. It was perceived as a *very limited exception* to a general rule of compensability for governmental impairment of private rights.

3. Expansion of the Police Power: Malum Prohibitum and Beyond.

The technological revolution, the increase and centralization of population, and the change in political and social consciousness which occurred roughly simultaneously

[19]There is one significant exception to this generalization, the emergency situation such as war exigency, spreading fire or virulent disease. Even then, the property owner was not always left without compensation. See, e.g., *United States v. Russell* (1871), 13 Wall. 623, 627-628, 20 L.Ed. 474; *Sweet v. Rechel* (1895), 159 U.S. 380.

and interdependently modified the relationship between the individual and the state. The pre-existing police power underwent a metamorphosis and began to be used in a broader spectrum of situations. It is beyond the scope of this brief to attempt to precisely chart its evolutionary expansion, but the first logical steps, from the *malum-in-se*-with-fault-implied situation, appear to be situations where the proscribed activity was (1) *malum in se* without connotation of wrongdoing and (2) *malum prohibitum,* i.e., not intrinsically bad but forbidden only because of time, place, and circumstances.[20]

4. Externalized Benefit: The Advent of Modern Land Use.

A major step was taken when the police power began to be used (cautiously at first) in externalized benefit situations, i.e., situations in which the sovereign desired not to stop a noxious activity on the subject property, but rather to insure the continuance or modification of an existing condition because it is beneficial to society.

Zoning, the most prominent type of large-scale land regulation, is of relatively recent origin. California became one of the first states to have zoning legislation, when the California Legislature passed such a law in 1917. A subdivision map act was first passed in 1929. Los Angeles created a series of use zones during the 1904-1915 period, putting it in the absolute vanguard of United

[20]As noted in *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365, 388:

> "A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard." 272 U.S. at 388.

States cities in that regard. However, Los Angeles had no comprehensive zoning until 1946. San Francisco first adopted a zoning ordinance in 1921. Other municipalities generally followed the lead of the metropolises. See Hagman, Larson & Martin, *California Zoning Practice* (California Continuing Education of the Bar 1969) §§ 1.3, 1.4.

The problem then presented to the courts was whether the holdings of police power cases dealing with nuisance suppression were adaptable to situations with no connotation of wrongdoing, or if new rules would have to be forged.[21] The problem was two-fold, addressing:

(1) government's right to comprehensively regulate, in the absence of wrongful or quasi-wrongful use of land, and

(2) the right of those whose interests were regulated to just compensation.

[21]Attempts to rigidly superimpose the Freund test on modern, non-nuisance cases have resulted in some very curious opinions. A striking example is the thoroughly wrongheaded decision of *Just v. Marinette County* (1972), 56 Wisc. 2d 7, 201 N.W.2d 761. In this case, the court in effect held that the state could regulate, under the Freund rubric, lands adjacent to navigable waters to the point of confiscation because permitting anything to be done on such lands would be *harmful* to the environment, and the regulation thus produced a *useful* result. This inversion approach presents interesting possibilities. For example, while it might appear that a hospital provides a public benefit and therefore *useful,* it could also be asserted that the absence of a hospital is *harmful,* and therefore land can be expropriated for a hospital without compensation. Or, to apply another twist, it could be stated that while the maintenance of a drug outlet adjacent to a high school might be considered *harmful* to the public, actually the absence of such an institution would be *useful* and, therefore, compensation is required if the outlet were forcibly closed. The Freund standard is thus reduced to a puerile semantic game.

5. The Euclid-Pennsylvania Coal Standard.

During the 1920's, in a series of cases of which *Pennsylvania Coal v. Mahon, supra, Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365 are the most famous, this court attempted to reconcile the increasing muscular exercise of police power by public entities with the just compensation clause.

In *Agins,* the California Supreme Court interpreted this court's opinion in *Euclid v. Ambler* to permit ever-increasing noncompensable regulation. 24 Cal.3d at 275. This misreads and misrepresents both the letter and spirit of that case. In the context of the case at bar, it must be consistently and firmly borne in mind that *the legal battleground in Euclid and related cases*[22] *was the power of the entity to regulate in the first instance, not the manner in which the cost of such regulation was to be borne or distributed.*

In *Euclid,* the petitioning party sought "an injunction restraining the enforcement of the [challenged zoning] ordinance." 272 U.S. at 384. Neither the words "just compensation", nor the words "inverse condemnation", nor the words "eminent domain", nor even the word "taking" appear in the decision *at all,* nor do the concepts they embody. The court simply held that the zoning plan "in its general scope and dominant features" was "a valid exercise of authority". 272 U.S. at 397. It cautioned that when the provisions of the comprehensive zoning plan were "concretely applied", some of them, or even many of them, may be

[22]*Zahn v. Board of Public Works* (1927) 274 U.S. 325; *Gorieb v. Fox* (1927) 274 U.S. 603; and *Nectow v. Cambridge* (1928) 277 U.S. 183.

found to be clearly arbitrary and unreasonable". 272 U.S. at 395. *Euclid* is thus, simply, authority for the right of a public entity to regulate in the public interest. It is respectfully urged that *Euclid* is *not* authority for an entity to regulate without the payment of just compensation.

Euclid v. Ambler Realty Co. and *Pennsylvania Coal Co. v. Mahon,* read in tandem, thus create a standard which makes possible aggressive and flexible police power exercise in the public interest, coupled with protection of private rights. An entity has a right to regulate and act vigorously, but a concomitant duty to equitably distribute the burdens generated by its acts.

6. Berman v. Parker.

Between 1928 and recent years, this court has been (at least compared to the 1915-1928 period) relatively dormant in this area, and heard few cases of special significance to the present appeal. *Berman v. Parker* (1954), 348 U.S. 26, however, is of profound importance here, framing in just and definitive terms the relationship of the police power and the just compensation guarantee. In *Berman,* the owners of properties in various states of disrepair in Washington, D.C., sought to enjoin condemnation of those properties under the District of Columbia Redevelopment Act, which authorized elimination of blighted properties dangerous to public health, safety, morals and welfare. About midway in his consideration, Judge William O. Douglas, writing for a unanimous court, stated:

> "We deal, in other words, with what traditionally has been known as *the police power.*" 348 U.S. at 32; emphasis added.

Through the remainder of the opinion, he speaks of the eminent domain power and police power as integrated, and not as separate and mutually exclusive tools, upholds the challenged act, and concludes:

> "The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking." 348 U.S. at 36.

Thus, this court clearly held once again that an exercise of police power in the public interest may generate the need for just compensation, but is not thereby invalid. *Agins v. City of Tiburon* is not reconcilable to this standard.

7. The Environmental Movement.

It seems that there have always been a few people visible, such as John Muir and Rachel Carson, who have enjoyed special sensitivity to the environment and the ability to communicate this awareness. They used to be called "conservationists"; the term "environmentalist" and the movement it describes matured from humble beginnings in the 1950's and 1960's. Land use practitioners and courts now find themselves dealing regularly with inventive and sometimes grandiose regulatory schemes seeking control and preservation of open space, scenic easements, threatened flora and fauna, and other exotic and esoteric interests, not remotely contemplated a few decades ago. Predictably, the existing body of land use law has once again been thrust into a new situation. It has been a tight

fit, working well in some situations and spawning irrational and confusing results in others.[23]

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[23]This is hardly new. The court need not be reminded that one of the salient characteristics of just compensation law is its startling disorder. Professor Arvo Van Alstyne describes it as "[w]ith some exceptions . . . largely characterized by confusing and incompatible results, often explained in *conclusionary terminology, circular reasoning*, and empty rhetoric." Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 So.Cal. L.Rev. 1, 2 (1970). Professor Joseph Sax notes that "the predominant characteristic of this area of law [is] a welter of confusing and apparently incompatible results." Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 37 (1964). In *Griggs v. Allegheny County in Perspective: 30 Years of Supreme Court Expropriation Law*, 1962 Supreme Court Rev. 63, Professor Allison Dunham labeled the decisions in this area by "the crazy-quilt pattern". In his justly celebrated article, Professor Frank Michelman described the law in this area as "liberally salted with paradox", and points to "jarring outcomes", "surprizing to the uninitiated". Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harvard L.Rev. 1165, 1169-1170 (1967).

Part of this colorful and disturbing jurisprudential history is **obviously traceable to the necessarily *ad hoc*** nature of court review; this each-case-on-its-own facts approach does not make for decisional harmony.

A larger problem, though, has clearly been a widespread misperception as to the essential nature of the police power and the eminent domain power. Instead of being recognized as harmonious and integrated aspects of a single power, the power to govern, they are often treated as two separate powers, each with its own set of component elements, generating widely variant consequences. Decisions based on this compartmentalization in case law are too often *a posteriori*, circuitously describing results without explaining how they were reached.

What too often happens is that if a court decides, after considering all applicable facts and circumstances that a particular taking or damaging was compensable, it affixes an "eminent domain" label. If, on the other hand, the court, after considering all applicable facts and circumstances, decides that the acquiring entity cannot or need not pay compensation, the regulatory act is dropped into the "police power" slot. Stating that a regulation was under the police power has unfortunately become a shorthand way of saying that it is noncompensable, and stating that it was

(footnote continued next page)

8. Penn Central.

This court's most recent extensive consideration of the just compensation clause in land use context, *Penn Central Transportation Co. v. New York* (1978), 438 U.S. 104, is fully explored in other briefs, and will not be here considered in detail. The 6-3 split suggests that the case stimulated a lively internal debate. The majority and the dissenters had little quarrel about the basic controlling principles, but disagreed as to their application to the facts.

In its analysis, the majority reiterated that the controlling standard was (as set forth in *Armstrong v. United States* (1960), 364 U.S. 40, 49) whether government action forces "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole".

The majority emphasized the importance of the "reasonable expectations of the claimant" in each case.[24]

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pursuant to the power of eminent domain has become a shorthand way of saying that it is compensable.

This has been compounded by the frame of reference in which regulation cases (particularly zoning and master plan cases) sometimes arise. Questions as to the right to constitutional just compensation simply get lost in a morass of municipal law minutia (dealing with notice, public hearings, resolutions and the like) which evolved in a totally different context. A resolution adverse to the property owner may follow based upon the misconception that if the enactment of a regulation was procedurally sound, it cannot raise a compensation issue, a classic instance of the tail wagging the dog.

[24]At 438 U.S. 127, it cited *Pennsylvania Coal* as "the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking' ", and in subsequent analysis, emphasized that the *effect* of the Pennsylvania statute was to make the contemplated use "commercially impracticable".

The majority was impressed that appellants had conceded that (1) the property in its present state was capable of earning a reasonable return; and (2) the transferable development rights they had been awarded by the agency in lieu of granting their development application were valuable rights. 438 U.S. at 129. Of further significance was the fact that income from other properties Penn Central owned was imputable to the terminal which was the subject matter of the action.

No such factors are present here. Appellants pled that the instant property as restricted is *not* capable of generating a reasonable return. They were awarded no right or compensation of any sort to offset the destruction that has been worked.

The majority noted at the end of its opinion (438 U.S. at 138, fn. 36):

> "We *emphasize* that our holding today is on the *present record* which in turn is based on Penn Central's *present ability* to use the Terminal for its intended purposes and in a gainful fashion. *The city conceded at oral argument that if appellants can demonstrate at some point in the future that circumstances have changed such that the terminal ceases to be, in the city's counsel's words, 'economically viable', appellants may obtain relief.*" See Tr. of Oral Arg. 42-43. (Emphasis added.)

The dissenters concurred as to the controlling principles, but not as to their application. From the dissent:

> "Appellees in response would argue that a taking only occurs where a property owner is denied *all* reasonable value of his property. The Court has frequently

held that, even where a destruction of property rights would not *otherwise* constitute a taking, the inability of the owner to make a reasonable return on his property requires compensation under the Fifth Amendment. See, e.g., *United States v. Lynah,* 188 U.S. 445, 470, 23 S.Ct. 349, 357, 47 L.Ed. 539 (1903). But the converse is not true. A taking does not become a non-compensable exercise of police power simply because the government in its grace allows the owner to make some 'reasonable' use of his property." 438 U.S. at 149; emphasis in original.

Penn Central is solidly in the mainstream tradition of this court's land use decisions. It is not reconcilable with the rigid California position enunciated in *Agins v. Tiburon,* and Appellee's analysis (Motion to Dismiss or Affirm, pp. 9-11, 13-14) is flawed insofar as it suggests to the contrary.

III

THE SUPPOSED DILEMMA BETWEEN ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS IS A FALSE DILEMMA. SOUND POLICY AND EQUITY MANDATE THAT SOCIETY PROTECT INDIVIDUAL RIGHTS WHICH FALL IN HARM'S WAY WHEN THE POLICE POWER IS EXERCISED IN THE PUBLIC INTEREST.

A. The Spurious Choice.

Those who champion noncompensable regulation urge that society must make a choice in this area, that it cannot both further the interests of the community and protect individual's rights in real property. This is a phantom dilemma, a false choice. The objectives are in no sense mu-

tually exclusive. It is not like a custody battle, or title dispute, where someone must win and someone must lose. Society can act boldly and innovatively in the furtherance of the land use priorities of the day, and at the same time protect individuals from bearing an unjust and disproportionate share of the burden generated by such acts. The question is not one of our *ability* to do this, but rather our *willingness,* and the price to our collective moral conscience if we do not.

If the purpose underlying the project in question is public, government always has the option of acquiring the interest it needs through formal condemnation. *Leo Sheep Co. v. United States* (1979), ...U.S. ..... [99 S.Ct. 1403, 1410].

The remainder of this point will examine some of the philosophic underpinnings of the California court's harsh position and some of the consequences which flow therefrom.

B. The Risk to the Fisc.

The majority dwells at length on the risk of financial chaos it foresees if society were required to justly distribute the economic displacement generated by land regulation. Indeed, this concern seems to be the cardinal consideration underlying the opinion. The spectre of Proposition 13 looms pervasively. The opinion seems to infer that we simply cannot afford to be fair. In fact, we cannot afford not to be fair.

There are a number of ways that financial exposure can be controlled: bond issues, fund diversions from lower

priority programs, incentives to voluntary cooperation (as with charitable contributions), cooperation between governmental levels (the public domain contains millions of acres with no particular environmental significance; the Federal Government could sell some to make funds available to permit acquisition of more sensitive properties), increase in efficiency, deferring or abandoning programs as an alternate to expenditure.[25] All of this is, however, incidental to the central problem of fairly socializing the burden.

C. New Reality or Old Confiscation?

It would be less than candid to fail to acknowledge that there is a political and philosophical aspect to this problem. It is not directly expressed in the opinion below, but abundantly in evidence in the secondary literature which had an impact on this opinion. There is a visible and articulate segment of our intellectual community which argues fervently that "new realities" require that we abandon as anachronistic private property (and often similarly "outdated" institutions and precepts such as the free enterprise system and the work ethic) and move (in the title phrase of the bestselling book by behaviorist B. F. Skinner) "Beyond Freedom and Dignity" (Alfred A. Knopf, 1971) toward some kind of collectivist nirvana. The particulars of this gilded future vary somewhat, depending upon whose

[25]If citizens or their elected representatives fail to make available funding for a particular project close to the enlightened hearts of planners, bureaucrats or local jurists who know best, deference to the expressed will of the people, whether or not soundly based, is appropriate. This is the American tradition. Attempts to override that expression in a manner bringing covert, incremental erosion of constitutional protections should not be tolerated.

blueprint is examined, but all seem to have as center supports (1) the increasing marshaling of our resources into the public sector of the economy, and (2) an enhanced presence of government in many aspects of our lives.

It is not the purpose of this brief to address the substantive merits of these visions, of which noncompensable land regulation is but one component.[26] But it must be noted that these are most significant issues, and any change should come through ballot box expression by the American people, following informed debate. Appropriate modifications in constitutional and statutory language should follow. Changes should not be made *sub silentio* by accretion and indirection, as happened in the opinion in the instant case, which accomplished a *de facto* transfer of rights in property worth literally billions of dollars from the private to the public sector of our economy in this state, with no public debate whatsoever.[27]

A quotation from a California case that has become greatly beloved by regulators and their friends in recent years is the expression in *Metro Realty v. County of El*

[26]A philosophic justification for noncompensable regulations often advanced by those who truly believe therein is that land has no intrinsic value, but only that value which society gives it. Accordingly, it is not unjust for society to take away that which it has given. See Bowden, *Environmental Legislation*, 4 Real Estate Law Journal 165, 174-175 (1975) for a representative articulation of this theory. This, again, is not the place for an extended analysis of this contention, beyond noting that if it is true for realty, it is also true for personalty, money, jobs, positions of power in government and industry, and a myriad of rights and relationships we greatly treasure but which would have no significance but for their (and our) interpersonal and social context. The mere fact that things which are part of our lives derive their basic meaning from social relationships does not mean they are not worthy of protection.

[27]This last sentence may appear to be hyperbole. It is not.

Dorado (1963), 222 Cal.App.2d 508, 518-519, 35 Cal.Rptr. 480, that "some uncompensated hardships must be borne by individuals as the price of living in a modern enlightened and progressive community."[28] This statement makes sense when its subject is temporary inconvenience or minor adjustments in value shared pervasively throughout a community. But the quotation is cynically inappropriate for situations of random and isolated confiscation of property interests worth hundreds of thousands, or even millions, of dollars. A society engaged in these activities without justly distributing burdens is neither enlightened nor progressive.

D. An Anomaly in the Law.

Consider these three hypothetical cases, each involving the same 10-acre parcel:

(1) Eight acres are subjected to direct condemnation, destroying 80% of the value of the owner's interest;

(2) Flood damage attributable to the public project destroys 80% of the value of the owner's interest; and

(3) The imposition of a regulation destroys 80% of the value of the owner's interest.

The impact on the property owner, and the policy considerations of basic fairness and congruence of benefit and burden, are identical in each situation. The mechanism of impairment is *labeled* differently in each case, but the *substance* of impairment in a constitutional sense remains the same. *Ergo,* the result in each case should be

[28]This was quoted by the California Supreme Court in *H.F.H., Ltd. v. Superior Court, supra,* 15 Cal.3d at 516.

the same. But if *Agins* is not overruled, California Courts will be charged to award damages in the first two situations and not the last. Form triumphs over substance, and label over reality. Logic and equity alike abhor such an anomalous result.

E. Ultimate Impairment.

Particularly difficult is the situation where a regulation removes virtually all use and value, leaving bare title in the property owner. He is then worse off than if he had been the victim of outright confiscation. Confiscation would merely deprive him of his investment in the land. Harsh regulation does that also, but further requires that he retain *ad valorem* tax liability; vulnerability to litigation under dangerous condition, attractive nuisance, and a plethora of other legal theories; and the responsibility to maintain the land consistent with local law. This is ultimate impairment.[29]

F. The Federal Alternative.

A predictable by-product of harsh recent California land use decisions has been an accelerating migration of aggrieved landowners into the federal courts. The increasing exercise of this federal option has brought its own response, which has been a state-wide campaign, apparently orchestrated by the office of the Attorney General (which has appeared as intervenor or *amicus curiae* in virtually every California land use case in the federal courts) to persuade federal judges to abstain from exer-

[29]See *Commissioner of Natural Resources v. Volpe & Co.* (1965), 349 Mass. 104, 206 N.E.2d 666; *Arverne Bay Construction Co. v. Thatcher* (1938), 278 N.Y. 222, 15 N.E.2d 587.

cising their jurisdiction in favor of the State bench, under the rubric that a state matter of considerable significance is involved.[30]

This tactic has met with mixed results. Some courts have abstained; others have not.[31] Abstention gives only temporary relief to the entities; under *England v. Louisiana State Board of Medical Examiners* (1964), 375 U.S. 411 plaintiffs are permitted to return to federal court for adjudication of federal issues at the conclusion of the state proceedings.

Contentions that land use regulation is a local matter best left to state and local tribunals ring hollow when those tribunals refuse to enforce the federal constitution. Should this court forge a firm remedy that California courts will be required to enforce, it is predictable that there will be fewer invocations of federal jurisdiction.

G. The Impotent Political Process.

It has been suggested that uncompensated victims of *de facto* confiscation should seek relief through the political process. This is not realistic.

[30]Under authority of *Railroad Commission of Texas v. Pullman Co.* (1940), 312 U.S. 496.

[31]Only those cases where abstention is ordered have reached the Ninth Circuit. Refusal to abstain does not produce an appealable order. The Ninth Circuit position has been that abstention is discretionary, and abstaining District Courts have been upheld. *Sederquist v. City of Tiburon* (1978), 590 F.2d 278; *Rancho Palos Verdes Corp. v. City of Laguna Beach* (1976), 547 F.2d 1092. The Sederquist property is on Tiburon Ridge, very close to the Agins property. A representative reported District Court case in which a motion for abstention was denied is *Barbaccia v. County of Santa Clara* (N.D. Cal. 1978), 451 F.Supp. 260.

Many governmental abuses can be controlled by the traditional sequence of (1) abuse, (2) public awareness and (3) throwing the rascals out. This pattern will not be effective here, since the expropriated rights and values are not seized for the private enjoyment of the expropriators, but rather become public property. The public is informed that the preservation of valuable land has been secured without cost, or whatever. Seldom do members of the public pause with concern and inquire at what cost, or more precisely, at whose cost, this has been accomplished. Rather than being threatened, the official's position is enhanced.[32]

The courts, for sound reason, have been the traditional guardians of individual rights at odds with public pressure, as for example those speaking or writing unpopular thoughts. The court has recognized that "the ascertainment of compensation is a judicial function". *Davis v. George B. Newton Coal Co.* (1925), 267 U.S. 292, 301. If the courts fail to preserve and protect the fundamental constitutional right of just compensation it will simply not be protected.

An excellent illustration of this principle is readily at hand. In *H.F.H., Ltd. v. Superior Court, supra,* the California Supreme Court, apparently recognizing that injustice could result from the harsh standard the decision formulated (a perception not reflected in *Agins v. City*

[32]This is a lesson that revolutionary leaders around the world have well learned. After taking power, one of the first things they typically do is to nationalize some industry, or seize and distribute wealth belonging to landlords, merchants and other members of the former upper or middle class, and thereby consolidate their power and position.

of Tiburon), suggested that relief could be obtained through recourse to the legislature.[33] 15 Cal.3d at 522. Progress report after five years of attempts to implement that suggestion: virtually nothing has happened.

IV

TO PERMIT A PROPERTY OWNER RELIEF FROM OPPRESSIVE LAND USE REGULATION ONLY WHEN THAT REGULATION DESTROYS SUBSTANTIALLY ALL USE OF THE PROPERTY DOES NOT RISE TO THE LEVEL OF A MEANINGFUL CONSTITUTIONAL PROTECTION.

A. A Constitutional Right Of High Dignity.

An aspect of the *Agins v. Tiburon* opinion that is cause for particular concern, meriting address by this court, is the language in the opinion limiting the protection of the just compensation clause of the Fifth Amendment to those situations where the utility of property is virtually destroyed.

From the outset of this nation's history, individual rights in property have been recognized as being of high worth and dignity. The linkage of life, liberty and property in the due process clause of the Fifth Amendment is no happenstance. The just compensation clause of that same amendment was the first constitutional protection of the Bill of Rights that became binding on the states under the doctrine of selective incorporation.[34]

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[33]The court's statement that the problems "lie beyond our remedial powers" is not soundly based. Just compensation law, beyond the basic constitutional charge, is judicially created and capable of judicial modification.

[34]*Chicago B&Q R.R. Co. v. City of Chicago* (1897), 166 U.S. 226. See dissent in *Walz v. Tax Commission* (1970), 397 U.S. 664, 701-702.

This court has, through the decades, reaffirmed the basic significance of this constitutional protection in a wide variety of contexts.[35] The court has correctly perceived that the rights of life, liberty and property exist in a state of symbosis, each depending on the other.[36] Property is the present residuum of past liberty.

To rebut those who speak disparagingly of "property rights" as something of minimal concern as contrasted to "personal" rights, this court made clear in *Lynch v. Household Finance Co.* (1972), 405 U.S. 538, 542, 552, that property has no rights, and that the rights protected by the just compensation clause are "basic civil rights".

B. Destruction By Reduction.

The constitutional language as interpreted by this court is too clear to permit any American court to simply decide that it chooses to no longer enforce the just compensation

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[35]Indeed, in *Agins*, the California Supreme Court gave lip service to this concept when it stated (24 Cal.3d at 273-274) that rights in property were "equated by the constitutional draftsmen with cherished personal protections" and that it would not ". . . countenance the service of this legitimate need [regulation of the use of private land] through the uncompensated destruction of private property rights." In the remainder of the opinion, the court countenances exactly that, and leaves the impression that the public entity, not the individual citizen, enjoys the constitutional protection.

[36]An oft-quoted exposition of this concept is from the dissent (5-4 split) in *Block v. Hirsch* (1921), 256 U.S. 125, 165, which dealt with rent control in a war emergency situation:

> "The security of property next to personal security against the exertions of government is of the essence of liberty, . . .
>
> "There can be no conception of property aside from its control and use, and upon its use depends its value. *Branson v. Bush*, 251 U.S. 182, 187, 40 Sup.Ct. 113, 64 L.Ed. 215. Protection to it has been regarded as a vital principle of republican institutions. It is next in degree to the protection of personal liberty and freedom from undue interference or molestation. *Chicago, Burlington, etc., R.R. Co. v. Chicago*, 166 U.S. 226, 17 Sup.Ct. 581, 41 L.Ed. 979."

clause. Rather than engaging in such straightforward rejection, the California court sounded the death knell by indirection. It redefined the just compensation clause in such a way as to make its protection illusory.

A brief reflection upon the language of the opinion (i.e., that there is no protection unless the effect of the regulation "is to deprive the landowner of substantially all reasonable use of his property")[37] makes this clear. Constitutional protections do not work this way. They consist of a pervading spirit and specific language, and both must be served if the protection is to have real force.

Analogies to other protected rights may sharpen perception of the effect of this destruction by reduction. The *Agins* holding is comparable to a ruling that the right of free speech under the First Amendment is intact unless the effect of the challenged restriction is "to deprive the

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[37]Since the limitation in *Agins* and *H.F.H., Ltd. v. Superior Court, supra,* is couched in terms of *use*, it is sometimes argued there is no protection against diminished *value*. The distinction is a *non sequitur*, since "the value of property results from the use to which it is put". *Cleveland C.,C. & St. L.R.R. Co. v. Backus* (1894), 154 U.S. 439, 445; See also *Branson v. Bush* (1919), 251 U.S. 182, 187.

Agins v. Tiburon (24 Cal.3d at 274, 277) refers repeatedly to "mere" diminution of value, suggesting a matter of minimal consequence. There is nothing "mere" about (to use the example from *H.F.H.* noted at 24 Cal.3d 274) a loss of $325,000, or the reduction in value of property to less than 20% of its former value. This is devastation, wipeout, catastrophy. To characterize it as "mere" is semantic surrealism approaching Orwellian newspeak. One might similarly speak of "mere mass murder" or "mere Holocaust". Federal courts sitting in California do not always escape this semantic trap, either; see the startling justification of an uncompensated reduction in value of property from $2,000,000.00 to $100,000.00 under the same rubric in *Haas v. City and County of San Francisco* (9th Cir. 1979), 605 F.2d 1117.

[citizen] of substantially all" of his right to speak freely. It is enough if there are still one or two subjects on which an unfettered utterance can be made. Of similar consequence would be a ruling that the freedom of religion is preserved unless the effect of the governmental inhibition is "to deprive the [communicant] of substantially all" of his faith and practice, i.e., a directive that would limit his worship to a quarterly expression within the confines of three ecclestical systems upon which the state has impressed its imprimatur would be upheld.

In *Truax v. Raich* (1915), 239 U.S. 33, this court passed upon a constitutional challenge to an Arizona statute prohibiting Arizona employers of more than five workers from maintaining a work force that was not "eighty (80) percent qualified electors or native-born citizens of the United States." 239 U.S. at 35. The court addressed the argument that since an employer could employ 20 percent aliens, i.e., in paraphrase of the *Agins* language, since the ordinance did not deprive the employer of substantially all of his right to employ aliens (or, more realistically, deprive aliens of substantially all of their right to find reasonable employment), the statute was not constitutionally infirm. The "fallacy" in this argument, wrote Justice Hughes, was that once the principle was admitted that the state could control the percentage of aliens employed there would be no limit on the state's power of exclusion. If 20 percent could be justified, so could 10 percent or 5 percent. The statute was struck down.

As did Arizona in *Truax v. Raich*, California in *Agins v. Tiburon* attempted to maintain the semblance of a constitutional protection, while at the same time so shrinking

its sphere of operation as to effect a *de facto* repeal. In Japanese *bonsai* cultivation, in which dwarf trees often live hundreds of years, miniaturization may aid preservation. In contrast, miniaturization of constitutional rights is antithetical to preservation. As the legislation in *Truax* amounted to "discrimination . . . against aliens as such in competition with citizens", so the standard of validity in *Agins* amounts to discrimination against holders of interests in property as such in relation to governmental bodies and benefiting citizens.

The justification offered by the California Supreme Court for its sweeping deference to regulators in *Agins v. City of Tiburon*, to encourage "strict" and "innovative planning measures", rather than more cautious and traditional ones (24 Cal.3d at 276), is similarly vulnerable. It is true that limiting the rights of property owners *would* make the whole process much more efficient. Democracy, as noted in the statement most often attributed to Harry Truman, is a particularly inefficient form of government. By the same token, if our criminal laws were modified to greatly diminish the rights of accused in criminal cases by substituting policeman hunches for the present standard of probable cause, doubling the length of all sentences, abolishing probation and parole, requiring a bare majority of a jury for a conviction, and substituting a much more relaxed standard for "beyond a reasonable doubt", we would have a "strict" and "innovative" program that would clearly be much more efficient in terms of reducing the incidence of crime, and getting the malefactors off the streets. The point is, however, that the social cost of these repressive changes is too great. Our system is grounded

on complex interweaving of checks and balances, and there is no reason why land regulators should be excepted therefrom. A little inhibition here can be a very healthy thing.

C. Reasonable Restrictions.

Amici do not contend that the right to just compensation is without limitation, any more than any other constitutional right is absolute. This court recently held again that the right to freedom of speech sometimes must yield to imperatives of national security. *Brown v. Glines* (1980), ... U.S. ..... [U.S. Law Week 4095] and *Secretary of Navy v. Hatt* (1980), ... U.S. ..... [U.S. Law Week 4122]. Freedom of religion approaches the absolute in what one may believe, but practice of such beliefs is sometimes sharply curtailed. *Reynolds v. Utah* (1878), 98 U.S. 145. See also the concurrence of Chief Justice Burger in *Police Dept. of Chicago v. Mosley* (1972), 408 U.S. 92, 102-103.

Liberal enforcement of the just compensation guarantee would not threaten life, or the moral order. Arguments against such enforcement, however highminded they might seem in initial statement, always seem on close scrutiny to reduce themselves to reluctance to fund. These are not persuasive. See Point III. B., *supra*.

D. Public Use.

A concept closely related to the idea that oppressive regulation cannot trigger a compensation has further increased the California property owners' already heavy task. This concept is that, in the absence of formal appropriation or physical invasion, the imposition of controls and restrictions (however harsh) upon private land for

public benefit does not constitute a "public use" of that land in a constitutional sense. This is implicit in *Agins v. City of Tiburon,* and is explicit in some recent decisions, such as *Friedman v. City of Fairfax* (1978), 81 Cal.App. 3d 667, 677, 146 Cal.Rptr. 687.

This is totally at odds with the expansive California concept of public use, which found expression in direct condemnation cases (notably *Gilmore v. Lime Point* (1861), 18 Cal. 229, and *Bauer v. Ventura* (1955), 45 Cal.2d 276, 284, 289 P.2d 1) which embody the ascendant public advantage (as distinguished from "public employment") standard.[38] Whether *Friedman* and other new cases will modify the traditional direct condemnation standard expressed in *Gilmore*, or whether there will now exist, simultaneously, two lines of cases—a line with a broad test for entities to rely on when direct condemnation is instituted, and a second line with a much more restricted definition of public use for use by the same entities when they are sued—remains to be seen.

A post-*Agins* case incorporating the narrow and regressive *Friedman* test, *Briggs v. State ex rel. Dept. of Parks and Recreation* (1979), 98 Cal.App.3d 190, 203, ... Cal. Rptr. ....., offers a full smorgasbord of rules and precepts limiting rights of property owners which are enjoying increasing presence in California cases. In that case, the Court of Appeal totally ignored strong trial court factual findings in favor of the owner, and held (among other

[38]See 2A Nichols, Eminent Domain, § 7.2 (rev. 3d ed. 1970); Condemnation Practice in California, § 6.4 (California Continuing Education of the Bar, 1973).

things) that she waived valuable rights by failing to assert them two years before they accrued.

It also repudiates the position that California courts (like courts of virtually all American jurisdictions) have heretofore embraced, that just compensation questions must be viewed from the vantage of the property owner. The inquiry of reviewing courts must center on what the owner has *lost*, not what the acquiring or regulating entity has *gained*.[39] This Court has repeatedly espoused this principle.[40]

The idea that the constitutional right to just compensation should depend upon "such formalities" as "formal appropriation or physical invasion" has been branded by Professor Joseph Sax as "preposterous".[41]

According to Professor Arvo Van Alstyne, the idea that the question of whether a physical invasion occurred has relevance to liability has "long since been relegated to the rank of an academic curiosity."[42] Nichols notes that the concept has been "uniformly rejected".[43] California first

[39]See, e.g., *People v. Lynbar, Inc.* (1967), 253 Cal.App.2d 870, 62 Cal.Rptr. 320.

[40]In, *inter alia, United States v. Causby* (1946), 328 U.S. 256, 261; *United States v. Miller* (1942), 317 U.S. 369.

[41]Sax, *Takings and Police Power*; 74 Yale Law Journal, 36, 47 (1964).

[42]Van Alstyne, *Taking and Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 So. Cal. L.Rev. 1, 7 (1970).

[43]2A Nichols, *The Law of Eminent Domain* (Rev. Ed. 1975), § 6.441.

rejected it as least as early as 1913.[44] And yet, in the year of our Lord nineteen hundred and eighty, this creaking anachronism has been dredged from the refuse heap of justly discarded legal shibboleths, given a new if ill-fitting suit of clothes, and brought forth as if it were the end product of an enlightened evolution.[45]

E. A Proposed Approach.

1. Overview.

The realization that *Agins* retention-of-de-minimus-use standard is not adequate does not resolve the problem of ascertaining the correct standard. The difference between substantial impairment and noncompensable regulation cannot be reduced to precise fractional value reductions. It depends upon a series of factors. This section will address some of these factors, and suggest a two-step analysis of particular situations which should add clarity and reduce injustice, by severing the evaluation of the threshold power to regulate from the consideration of the economic consequences of such regulation.

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[44]*Pacific Telephone Co. v. Eshelman*, 166 Cal. 640, 137 P. 1119. See also, *Penn Central Transportation Co. v. City of New York*, *supra*, 438 U.S. 104, fn. 25; *San Antonio River Authority v. Garrett Brothers*, *supra*, 528 S.W.2d at 273; *Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, *supra*, 80 Harv. L.Rev. at 1186-1187.

[45]In this context, it is not signficant that California and 23 other states provide protection against damages as well as taking in the just compensation clauses in their constitutions (Cal. Const. Art. 1 § 19 is reproduced as Appendix A, *infra*). The federal provision has been construed sufficiently expansively by this court to provide virtually parallel protection. See, e.g., *U.S. v. Kansas City Insurance Co.* (1950), 339 U.S. 799.

2. Relevant Factors.

The single most important consideration remains diminution of value (or, if preferred, limitation of use, which is synonymous), seen both in terms of percentage reduction and absolute dollars. Also significant is the question of whether the consequences of a particularly regulatory imposition are isolated on a few individuals or spread throughout a larger community (thus intrinsically meeting the objective of the just compensation clause). A related inquiry is whether the complainant's property is treated differently from contiguous properties, or comparable properties in the area.

Very pertinent is the reasonable investment-backed economic expectation of the regulatee. In determining reasonableness, representations and promises made by entity officials or employees should be given full weight, whether or not the entity is technically liable therefor under the law of *respondeat superior*.

Another factor often discussed is acquisitive intent. Regulation is often employed as a softening device prior to actual acquisition.[46] If such intent is manifest, it should be considered. But if the absence of documented evidence of acquisitive intent is excessively emphasized, budget-conscious agencies may be unduly tempted to use regulation as a substitute for acquisition.

Even more troublesome is the periodic attempt by courts to balance private loss against collective gain. Michelman rejects this as "a mistake, at best reflecting a careless con-

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[46]See Kanner, Condemnation Blight: Just How Just is Just Compensation? 48 Notre Dame Lawyer 765 (1973).

fusion of two quite distinct questions."[47] A regulation is "valid" or "invalid" depending upon whether its objective is proper and whether the restrictions and controls it imposes are reasonably related to that objective. The just compensation clause is violated if a regulation requires an individual to bear more than his fair share of the total economic burden thereby generated.[48]

An affirmation that could emerge from this case that would be very helpful is that zoning or regulating property into open space is a full taking for which compensation must be paid. This is true whether the open space is *de jure* or *de facto,* i.e.:

(1) where the regulation has the effect of preventing development, but preserves a nominal *de minimus* use in the owner so that a euphemism can be used for "open space"; or

(2) where (as is here pleaded, because of the costs of on-site and off-site improvements) the permitted use is so uneconomical to be effectively prohibited.

3. Suggested Two-Step Analysis.

The first step of this proposed approach focuses upon threshold questions such as (1) the fundamental power of the body to regulate in the area it purports to act, (2)

[47] Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, supra,* 80 Harv. L.Rev. at 1194. See also 1 Nichols, *The Law of Eminent Domain* (rev. 3d ed. 1974) § 1.11.

[48] Balancing makes sense only when the *special* and *particular* benefits received by the property owner, as distinguished from the *general* benefits the regulation or act bestows upon the community, are balanced against his loss. The idea that the more valuable the object a citizen is coerced into surrendering to society, the less right he has to compensation, is a logical aberration.

statutory and constitutional standards (except for just compensation), (3) procedural regularity (notice, hearing, conformance to time requirements), and (4) questions which are basically political (necessity, location, aesthetic particulars, etc.). In reviewing these political aspects, courts appropriately confess reluctance to substitute their judgment for that of the political body.

If the challenged regulation clears this first phase, step two poses a solitary question: Has the regulation violated the just compensation clause? Since it is exclusive province of the judiciary to determine whether compensation is required, no deference whatsoever need be given to any utterances of intention which may have been tendered by the entity or any representative thereof. The impact, not the intent, controls. As Justice Stewart noted in concurrence in *Hughes v. Washington* (1967), 389 U.S. 290:

> "As is so often the case when a State exercises its power to make law, or to regulate, or to pursue a public project, pre-existing property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*." 389 U.S. at 298; emphasis in original.[49]

If violation of the just compensation clause is found, an appropriate remedy should be fashioned. It would be a mistake to assume that an entity would invariably opt for invalidation. Sometimes the goal behind a regulation might

[49] From *Davis v. George B. Newton Coal Co.* (1925), *supra,* 267 U.S. at 301: "The incantation pronounced at the time is not of controlling importance; our primary concern is with the accomplishment."

be deemed of such significance, or a regulatory scheme might represent such an investment of time and energy, that the entity would choose payment of fair compensation to abandonment. The complex scheme involved in the *Rail Reorganization Cases* (1974), 419 U.S. 102, illustrates the type of regulatory program that would not be casually abandoned. Flexibility in remedy is here the *sine qua non.*

V

BY AN OVERWHELMING MAJORITY, LEGAL SCHOLARS OF THE FIRST TIER FAVOR COMPENSABLE REGULATION.

A. Specific Secondary Authorities Cited In Agins.

1. Literature Extensive.

In *H.F.H., Ltd. v. Superior Court, supra,* the California Supreme Court made reference to the "voluminous secondary literature on the taking issue". 15 C.3d at 520. The acknowledgment of the existence of this literature (and it is indeed rich and voluminous) raises inquiry as to the reason for the curiously skimpy citations to it in *Agins v. Tiburon.* Even a brief perusal of this literature is sufficient to clear up this mystery, however. The thrust of this literature, and especially its most respected treatises, is patently inconsistent with the resolution the majority reached.

The majority cited five secondary authorities. Two can be disposed of summarily.

2. Standard Treatise Wrongly Cited.

The court's quotation from the standard condemnation text[50] at 24 C.3d 272, to buttress its conclusion the oppresive regulation cannot create an action in damages is seriously misleading. This section speaks only to what constitutes and what does not constitute a valid exercise of governmental power, and does *not* concern itself with remedies. Elsewhere in his treatise, Nichols states:

> "The modern, prevailing view is that any substantial interference with private property which destroys or lessens its value (or by which the owner's right to its use or enjoyment is in any substantial degree abridged or destroyed) is, in fact and in law, a 'taking' in the constituutional sense, to the extent of the damages suffered, even though the title and possession of the owner remains undisturbed." 2 *Nichols on Eminent Domain* [3d rev.ed. 1975] (§ 6.13 at p. 6-65.)

When both quotes are read in context, it is clear that *Nichols* does *not* support the majority opinion.

3. Remaining Citations.

The most prestigious treatise mentioned in the opinion, Professor Ellickson's *Suburban Growth Controlling An Economic and Legal Analysis,* 86 Yale L.J. 385 (1977) is cited only for its "contrary analysis". 24 Cal.3d at 266.

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[50]The quoted language: "Not only is an actual physical appropriation under an attempted exercise of the police power, in practical effect an exercise of the power of eminent domain, but if regulative legislation is so unreasonable or arbitrary as virtually to deprive a person of the complete use and enjoyment of his property, it comes within the purview of the law of eminent domain. Such legislation is an invalid exercise of the police power since it is clearly unreasonable and arbitrary. It is invalid as an exercise of the power of eminent domain since no provision is made for compensation." 1 Nichols, *Eminent Domain* (3d rev.ed. 1975) § 1.42(1), pp. 116-121.

That leaves only three supporting authorities. Two of these are student notes[51] and the third is an outspoken attack on the principle of private property by an Associate Professor of Environmental Studies at the University of California at Santa Cruz.[52]

It is not the intention of the brief to denigrate student comment. In this field as well as others, it has made significant contribution through the years. It is true, however, that much of the literature advocating limited compensation or no compensation is student comment.[53] As will be more particularly demonstrated hereinafter, scholars of the highest reputation, who have worked and written in this field for years, are virtuaully in total accord in their urging for the availability of monetary relief in harsh regulation situations.

B. Michelman.

Professor Frank I. Michelman's incisive monograph *Property, Utility and Fairness: Comment on the Ethical Foundations of "Just Compensation" Law*, 80 Harvard L. Rev. 1165 (1967) has grown in reputation through the

[51]Fulham and Scharf, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance* (1974), 26 Stan. L. Rev. 1439, 1450-1451, and Hall, *Eldridge v. City of Palo Alto: Aberration or New Direction in Land Use Law?*, 28 Hastings L.J. 1569 (1977).

[52]Bowden, *Legal Battles on the California Coast: A Review of the Rules*, 2 Coastal Zone Management Journal 273 (1974). Professor Bowden is a graduate of Boalt Hall School of Law at the University of California (Berkeley).

[53]Not all student notes take such a rigid pro-regulator position. See, for example, *An Evaluation of the Rights and Remedies of a New York Landowner for Losses Due to Government Action—With a Proposal For Reform*, 33 Albany L.Rev. 537 (1969), and *Compensable Regulations: Outline of a New Land Use Planning Tool*, 10 Willamette L.I. 451 (1974).

years, and is probably the most influential article on the just compensation clause. This court cited it repeatedly in *Penn Central Transportation Co. v. City of New York, supra.*

While the Michelman treatise, like the Bible, offers something for all points of view, its basic alignment is on the side of fairness in just compensation deliberations, "and that its most important immediate implication for public policy pertains to the assignment of responsibility for ensuring that compensation is paid whenever it ought to be." Michelman, *op.cit. supra* at 1172.

In this articulation of his central premise, Professor Michelman stressed the compelling need for:

> " . . . resolute sophistication in the face of occasional insistence that compensation payments must be limited lest society find itself unable to afford beneficial plans and improvements. What society cannot, indeed, afford is to impoverish itself. It cannot afford to instigate measures whose costs, including costs which remain 'unsocialized' exceed their benefits. Thus it would appear that *any measure which society cannot afford or, putting it in another way, is unwilling to finance under conditions of full compensation, society cannot afford at all.*" Michelman, *op.cit. supra* at 1181; emphasis added.

One point suggested in this paragraph, and developed more fully in the remainder of the article, is that the consequences flowing from the use or denial of compensation as a tool in land regulation law are far more subtle than initial analysis might suggest. Failure of fair cost distribution will often bring in its wake social, economic and

political consequence of real magnitude quite apart from the initial adverse impact on the owner of the impaired interest.[54] The court's attention is especially invited to this consideration, which pervades the treatise.

In his analysis, Michelman relied heavily on the widely respected *A Theory of Justice* by John Rawls (Harvard, 1971).[55] Professor Rawls repudiates the utilitarian greatest-good-for-greater-number philosophy and eloquently advocates a sensitive approach to justice, cognizant of both majority needs and minority rights:

> "It has seemed to many philosophers, and it appears to be supported by the convictions of common sense, that we distinguish as a matter of principle between the claims of liberty and right on the one hand and the desirability of increasing aggregate social welfare on the other; and that we give a certain priority, if not absolute weight, to the former. Each member of society is thought to have inviolability founded on justice, or, as some say, a natural right, which even the welfare of everyone else cannot override. Justice denies that the loss of freedom for some is made right by a greater good shared by others. The reasoning which balances the gains and losses of different persons as if they were one person is excluded. Therefore, in a just society the basic liberties are taken for granted and the rights secured by justice are not subject to political bargaining or to the calculus of social interest." Rawls, *op.cit. supra*, pp. 27-28.

[54]An example of this kind of indirect cost is evident in the present case. Tiburon restricts development to maintain an open ridge. This decreases housing available in that city and, through a spill-over ripple effect, in surrounding communities. The cost of housing rises sharply. The positive correlation between the pro-open space and anti-growth policies of many Bay Area communities, and the high and accelerating cost of housing in this area, is so apparent as to require no supporting authority.

[55]This volume collects earlier articles. See Michelman, *op cit.*, p. 1219 for original citations.

The California Supreme Court in *H.F.H. Ltd. v. Superior Court, supra*, quoted language from the Michelman treatise likening land purchase to a sweepstakes ticket. 15 Cal.3d at 521. The point made was that a prospective purchaser of real property interest should know that realty might thereafter be subject to restrictions. If it is so subjected, he simply took a risk and lost, and need not be compensated. This quotation and the analysis it supported are misleading for several reasons: *First*, the sweepstakes analogy is inapposite. Land regulation is *not* like a sweepstakes. The basis of a sweepstakes is random chance, producing fortune or misfortune. In land regulation, misfortune is deliberately and intentionally inflicted as an act of individual or collective will. The only thing randomized is the burden. *Second*, the analysis of the California Supreme Court could apply equally well to someone buying property while knowing that it might someday be taken for a school or a hospital. Under that analysis, the purchaser similarly took a risk and lost, and therefore, should receive no compensation. *Finally*, the quotation is shorn of its context. The result in *H.F.H. Ltd. v. Superior Court*, like the result in *Agins*, is simply incompatible with the pro-compensation thrust of Professor Michelman's article.

C. Van Alstyne.

A scholar and lecturer of comparable rank with Professor Michelman is Arvo Van Alstyne, former Professor of Law at U.C.L.A. and presently Professor of Law and As-

sistant to the President at the University of Utah. Professor Van Alstyne's work[56] is particularly germane to this case, since it centers on California experience.

Like Michelman, Van Alstyne favors fair distribution of burdens generated by land use controls through compensable regulation. During the pendency of *H.F.H. Ltd. v. Superior Court, supra,* before the California Supreme Court, Professor Van Alstyne wrote a letter (dated December 24, 1974) to the writer of this brief expressing his view of the issues raised. From that letter, which (with his permission) was made part of an *amicus curiae* brief:

> "It has long been my opinion, based upon a comprehensive study of cases dealing with inverse condemnation, that ultimate judgments on compensability should not be predicated upon the classification of the particular power as being 'police power' or 'eminent domain' but rather should be predicated upon a more sophisticated attempt to identify factors relevant to the issue of compensability . . .
>
> "Thus, what I am suggesting is that the law should be moving in the direction of a careful evaluation of the effect of the governmental power upon private rights to determine the question of compensability.

[56]An imposing body, including, *inter alia, Statutory Modifications of Inverse Condemnation: The Scope of Legislative Power,* 19 Stanford L.R. 727 (1967); *Modernizing Inverse Condemnation: A Legislative Prospectus,* 8 Santa Clara Lawyer 1 (1967); *Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction,* 20 Stanford L.R. 617 (1968); *Inverse Condemnation: Unintended Physical Damage,* 20 Hastings L.J. 431 (1969); *Just Compensation of Intangible Detriment: Criteria for Legislative Modification in California,* 16 U.C.L.A. L.Rev. 491 (1969); *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria,* 44 So.Cal. L.R. 1 (1971), and the practice book *California Government Tort Liability* (California Continuing Education of the Bar 1964) with supplements.

> This effect could well be judged by giving consideration to such matters as the substantiality of the detriment or interference sustained by the affected private person, the extent to which the regulation forces the affected individual to contribute benefits for the public welfare rather than to terminate externalized harms which he is inflicting upon the public, the extent to which the affected person is being required to assume more than a fair share of the cost of public improvements, and the extent to which the action taken frustrates reasonable investment-backed expectations with respect to the relationships between government programs and activities and private property interests."[57]

D. Other Scholars.

In an extended brief in support of the property owners in *H.F.H., Ltd. v. Superior Court,* Professors Gideon Kanner of Loyola of Los Angeles School of Law and Donald G. Hagman of U.C.L.A. College of Law[58] (themselves both in

[57]There is more recent evidence of the conceptual abyss between Van Alstyne and the California courts. A Court of Appeal in *Briggs v. State of California, supra,* cited a Van Alstyne article (*Inverse Condemnation: Unintended Physical Damage, supra*) for the proposition that the substantial contributing clause rule is limited to physical damage situations. (98 C.A.3d at 204). The authority cited does not support this position, which is in fact diametrically opposed to the author's utterances in point. This abuse brought a pointed and prompt letter from Professor Van Alstyne to counsel for one of the parties, wherein it was stated with vigor and indignation that the court had "totally misconstrued my views". This letter was brought to the attention of the Court of Appeal during the Petition for Rehearing process. It prompted only a modest, non-substantive modification of the particular reference. The opinion as modified *still* imputes a view to Professor Van Alstyne inconsistent with that consistently expressed in his letter and pertinent writings.

[58]Professor Kanner is the author of numerous articles in the land use regulation field, such as *The Consequences of Taking Property by Regulation,* 24 Practical Lawyer 65 (1975). He is Chairman of the Condemnation Committee of the American Bar Association and

(footnote continued next page)

the forefront of legal scholars favoring compensable regulation as a tool to distributive justice in land use cases) surveyed the secondary literature in point. They found among scholars of the first tier (in addition to themselves and the Douglas Commission)[59] twenty-three favoring (albeit with varying degrees of enthusiasm and widely divergent ideas as to the mechanics of implementation) compensable regulation, against a single dissenter. The ayes included Richard Babcock,[60] Leland Badler,[61] John Banta,[62] Lawrence Berger,[63] Fred Bosselman,[64] John T. Cabaniss,[65] David Callies,[66] Donald M. Carmichael,[67] John

served as an adviser to the Committee which drafted the Uniform Eminent Domain Code. He is also the publisher of *Just Compensation*, the national monthly service in condemnation law, and the founding president of the California Academy of Appellate Lawyers. He is an attorney of record for appellants in the instant case.

Professor Hagman is the author of a wide variety of monographs and books, including *California Zoning Practice* (California Continuing Education of the Bar 1969, Supp. 1978) and (with Dean Misczynski) *Windfalls for Wipeouts: Land Value Capture and Compensation* (American Society of Planning Officials, 1978).

[59]This commission, dominated by laymen, issued a major report in 1968 entitled *The National Commission on Urban Problems, Building the American City*, favoring compensation.

[60]Babcock, *New Directions in Connecticut Planning Legislation*, 50 (American Society of Planning Officials 1967).

[61]Badler, *Municipal Zoning Liability in Damages—A New Cause of Action*, 5 Urban Lawyer 25 (1973).

[62]See Footnote 64, *infra*.

[63]Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L.Rev. 165 (1974).

[64]Bosselman, *The Third Alternative in Zoning Legislation*, 17 Zoning Digest 73 (1965). Mr. Bosselman is co-author (with Banta and Callies) of *The Taking Issue* (Council of Environmental Quality 1973). This triumverate favors a more limited use of compensation and greater deference to government than most of the remaining scholars on this list.

[65]Cabaniss, *Inverse Condemnation in Texas, Exploring the Serbonian Bog*, 44 Texas L.Rev. 1584.

[66]See Footnote 64, *supra*.

[67]Carmichael, *Transferable Development Rights as a Basis for Land Use Control*, 2 Fla. St. U. L.Rev. 35 (1974).

J. Costonis,[68] J. Delafons,[69] Allison Dunham,[70] Robert C. Ellickson,[71] T. J. Kent,[72] Jan Z. Krasnowiecki,[73] Daniel R. Mandelker,[74] Frank I. Michelman, James C. N. Paul,[75] Jerome G. Rose,[76] Joseph L. Sax,[77] Paul Schmid,[78] Ann Louise Strong,[79] Arvo Van Alstyne, and Graham Waite.[80] The sole absolute nay was Jacob Henry Beuscher.[81]

[68]Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 Harvard L.Rev. 574 (1972). Professor Costonis has emerged as a prolific writer of growing reputation, whose many treatises are increasingly cited.

[69]Delafons, an English scholar of high repute, authored *Land Use Controls in the United States* (2d ed. 1969).

[70]Dunham, *From Rural Enclosure to Re-Enclosure of Urban Land*, 35 N.Y. U. L.Rev. 1238 (1960).

[71]Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U.Chi. L.Rev. 681 (1973).

[72]Kent, *Open Space for the San Francisco Bay Area: Organizing to Guide Metropolitan Growth*, Berkeley Institute of Governmental Studies (1970).

[73]Krasnowiecki and Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 U. Pa. L.Rev. 179 (1961); Krasnowiecki and Strong, *Compensable Regulations: A Means for Controlling Growth Through The Retention of Open Space*, 29 J.Am. Inst. Pllers .... (1963).

[74]Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 Wisconsin L.Rev. 3.

[75]See Footnote 73, *supra*.

[76]Rose, *A Proposal For Separation and Marketability of Development Rights as a Technique to Preserve Open Space*, 2 Real Estate L.J. 635 (1974).

[77]Sax, *Takings Private Property and Public Rights*, 81 Yale L.J. 149 (1971).

[78]Schmid, *The Role of Grants, Exchange and Property Rights in Environmental Policy, Transfers in an Urbanized Economy*, 340 (K. Boulding, M. Pfaff & A. Pfaff, ed. 1973); *Tax Policy and Land Use Guidance Techniques, Land-Use Policies* 19 (1970). Professor Schmid is a leading economist.

[79]See Footnote 73, *supra*.

[80]Waite, *Governmental Power and Private Property*, 16 Cath. U. L.Rev. 283 (1967).

[81]Beuscher, *Land Use Controls: Cases and Materials* (3d ed. 1964).

The few years that have transpired have not notably shifted opinion among the most reputable scholars.[82]

CONCLUSION

We do not believe that the imperatives of a rational land use program mandate the emasculation of the Bill of Rights.

We do not believe that the quantum of protection afforded by the Bill of Rights to citizens should vary dramatically from jurisdiction to jurisdiction.

We do not believe that the concept that the party enjoying the benefit shall bear the burden, which has quickened Anglo-American jurisprudence since that system took a visible form, should now be discarded.

We do not believe that a public entity should be able to internally determine whether the community as a whole, on the one hand, or a single individual or a few individuals, on the other hand, is to assume the cost of a public improvement, and to implement this determination by the simple expedient of labeling its acquisitive act.

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[82]Post-1974 monographs of special interest, favoring compensation, are the Ellickson article cited on page 53, *supra*, and M. Berger, *To Regulate or Not to Regulate: Is That the Question? Reflections on the Supposed Dilemma Between Environmental Protections and Private Property Rights*, 8 Loyola of L.A. L.Rev. 253 (1975). A thoughtful article by a practicing attorney published just prior to 1974 is Harris, *Environmental Regulations, Zoning, and Withheld Municipal Services: Takings of Property by Multi-Governmental Action*, 25 U. Fla. L.Rev. 635 (1973).

For all the reasons set forth herein, we urge that the decision of the Supreme Court of California be reversed and the rights of citizens to vigorous protection of their constitutional rights be reaffirmed.

Dated, San Francisco, California, February 20, 1980.

Respectfully submitted,

GOLDSTEIN, BARCELOUX
& GOLDSTEIN
FADEM, BERGER & NORTON
JESS S. JACKSON, JR.
THORPE, SULLIVAN, WORKMAN,
THORPE & O'SULLIVAN
DESMOND, MILLER, DESMOND
& BARTHOLOMEW
MATTEONI & SAXE
ADAMS, LEVIN, KEHOE, BOSSO
SACHS & BATES
JOSEPH GUGHEMETTI
BRESSANI, HANSEN & BLOS
OGLE, GALLO & MERZON
THOMAS G. BAGGOT, JR.
WILLIAM CHIDLAW
MALAVOS & CHASUK
FITZGERALD & EDGAR
ATHERTON & DUNN

By M. REED HUNTER

(Appendices Follow)

Appendices

APPENDIX A

Constitution of the United States, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of California, Article 1, Section 19

Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the

condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.

APPENDIX B

Burton J. Goldstein
M. Reed Hunter
Goldstein, Barceloux & Goldstein

Mr. Goldstein has been active in the trial and appellate courts in condemnation and land use cases since 1938. A frequent author and lecturer, he authored the chapter on inverse condemnation in *Condemnation Practice in California* (California Continuing Education of the Bar, 1973). He is presently the Chairman of the American Bar Association Committee on Condemnation, Land Use and Zoning of the Section of Litigation for the State of California. Mr. Hunter has been active in this field in California since 1968 (after earlier practice in Utah). He edited *Condemnation Practice in California* (California Continuing Education of the Bar, 1973), has served on the California State Bar Condemnation Committee, and is the President of the California Academy of Appellate Lawyers. Like many of the attorneys hereinafter listed, Mr. Goldstein and Mr. Hunter are members of the Bar of this Court.

Gerald A. Fadem
Michael M. Berger
Fadem, Berger & Norton

Gerald A. Fadem has concentrated his trial practice in condemnation and land use regulation law since 1953, and has tried more than 200 eminent domain cases. He served as counsel for property owners in *Nestle v. City of Santa Monica* (1972), 8 Cal.3d 920, 101 Cal. Rptr. 568, 496 P.2d 480, and *People v. Lynbar, Inc.* (1967), 253 Cal.App.2d 870, 62 Cal.Rptr. 320. He has frequently lectured in his area of

expertise, and is the author of a number of articles. He was chairman of the California State Bar Condemnation Committee for the year 1977-1978. Mr. Berger is Vice President of the California Academy of Appellate Lawyers and has written frequently in this field. Representative articles (in addition to those cited in the text of this brief) are *Nobody Loves An Airport*, 43 So. Calif. L.Rev. 631 (1970), and *A Noisy Airport Is A Damned Nuisance*, 3 Southwestern U.L. Rev. 39 (1971; co-authored with Mr. Fadem).

Jess S. Jackson, Jr.

Mr. Jackson has been in practice for 25 years, and was counsel for property owners in *Drakes Bay Land Co. v. The United States* (Ct. Clms. 1970-72), 424 F.2d 574, 459 F.2d 504, and *Richmond Elks Hall Assn. v. Richmond Redevelopment Agency* (9th Cir. 1977), 561 F.2d 1327). He has participated in numerous continuing education courses. He was Chairman of the California State Bar Condemnation Committee for the year 1976-1977, and is a former President of the California Coastal Council.

Roger M. Sullivan
Henry K. Workman
John J. Dee
Thorpe, Sullivan, Workman,
Thorpe & O'Sullivan

Mr. Sullivan has been practicing land use and condemnation law since 1952. Mr. Workman, who presently concentrates on the appellate phase of this practice, has practiced law since 1950, while Mr. Dee has been similarly active for about a decade. Mr. Sullivan was Chairman of the California State Bar Condemnation Committee for the year 1975-1976. He also served as Chairman of the Con-

demnation Law Committee of the Real Property Section of the American Bar Association and as an adviser to the Uniform Law Commissioners of the American Bar Association who drafted the model Eminent Domain Code. He was counsel for property owners in *United States v. Eden Memorial Park* (9th Cir. 1965), 350 F.2d 933. Mr. Dee has served on the California State Bar Condemnation Committee, and both he and Mr. Workman have been members of the Los Angeles County Bar Condemnation Committee. This firm was also counsel for property owners in *Southern California Edison Co. v. Bourgerie* (1973), 9 Cal.3d 169, 107 Cal.Rptr. 76, 507 P.2d 964, and *City of Santa Barbara v. Petras* (1971), 21 Cal.App.3d 506, 98 Cal.Rptr. 635.

Richard F. Desmond
Stephen J. Wagner
Desmond, Miller, Desmond & Bartholomew

Richard F. Desmond has been a trial and appellate lawyer in land use and condemnation since 1951. He was the Chapter President of the Lawyers Club of Sacramento, and served as Chairman of the State Bar Condemnation Committee during the year 1978-1979. Stephen J. Wagner has been practicing in the same field since 1975. This firm was counsel for the property owners in, *inter alia, Jones v. People* (1978), 22 Cal.3d 144, 148 Cal.Rptr. 640, 583 P.2d 165, and *Parking Authority of the City of Sacramento v. Nicovich* (1973), 32 Cal.App.3d 420, 108 Cal.Rptr. 137. These attorneys have appeared repeatedly through the years before various committees of the California legislature.

Norman E. Matteoni
Matteoni & Saxe

Mr. Matteoni has been practicing law since 1964. For many years he was a member of the staff for the County Attorney for Santa Clara County and handled major condemnation and land use cases for that office. A prolific author, Mr. Matteoni has contributed extensively to publications of California Continuing Education of the Bar (including the 1973 Practice Book), and authored two articles in the January, 1969, issue of the *Hastings Law Journal*, a special land use issue. He presently serves on the California State Bar Condemnation Committee.

Dennis J. Kehoe
Adams, Levin, Kehoe, Bosso,
Sachs & Bates

Mr. Kehoe's firm has a large land use practice in the South Bay. Mr. Kehoe formerly was in the County Attorney's Office and, during that period, was counsel for County officials in the leading case of *Pratt v. Adams* (1964), 229 Cal.App.2d 602, 40 Cal.Rptr. 505.

Joseph Ghughemetti

Mr. Ghughemetti, a young trial lawyer specializing in land use and condemnation cases, has been active in the political as well as the legal sphere. He has drafted proposed legislation and testified before Congressional and state legislative hearings. He is president of the California Coastal Council.

Gerald B. Hansen
Bressani, Hansen & Blos

Mr. Hansen has been active in condemnation and inverse condemnation law in the rapidly growing San Jose area

since he commenced practice almost 30 years ago. He has tried about 50 land use cases to verdict. He has served as a member of the California State Bar Condemnation Committee.

Charles E. Ogle
Ogle, Gallo & Merzon

Mr. Ogle's firm has a large practice in land use law in the central-coast area of California. He has been practicing for 28 years. Among the cases in which he was counsel of record is *People v. Bailey,* a companion case to *Merced Irrigation District v. Woolstenhulme* (1971), 4 Cal.3d 478, 93 Cal.Rptr. 833, 483 P.2d 1.

Thomas G. Baggot, Jr.

Mr. Baggot has represented public entities and property owners since 1948. He is presently Chairman of the California State Bar Condemnation Committee, and was earlier Chairman of the Los Angeles County Bar Condemnation Committee. He contributed to both the 1962 and 1973 practice books published by California Continuing Education of the Bar. He was counsel for the property owners in the landmark case of *Klopping v. Whittier* (1972), 8 Cal.3d 39, 104 Cal.Rptr. 1, 500 P.2d 1345.

William Chidlaw

In his 27 years as an active attorney, Mr. Chidlaw has developed an extensive and diversified practice. Condemnation and land use is one of his areas of special expertise. He is presently Vice-Chairman of the California State Bar Condemnation Committee.

Alfred P. Chasuk
Malovos & Chasuk

Active in this field since 1951, Mr. Chasuk concentrates on trial practice. He was counsel for property owners in *People ex rel. Dept of Public Works v. Kawamoto* (1964), 320 Cal.App.2d 18, 40 Cal.Rptr. 685.

William R. Edgar
Fitzgerald & Edgar

Mr. Edgar has been specializing in this field of law since admission to the Bar in 1959. In his early years of practice, he concentrated on representing public entities; *People ex rel. Dept. of Public Works* (1968), 68 Cal.2d 206, 65 Cal. Rptr. 342, 436 P.2d 342, dates from that period. A more recent case is *Golden Gate Bridge District v. Muzzi* (1978), 83 C.A.3d 707, 148 Cal.Rptr. 197. Mr. Edgar has served as a member of the California State Bar Condemnation Committee and is the author of *Leasehold Valuation Problems and Eminent Domain,* 4 San Francisco L.Rev. (1969).

Michael A. Atherton
Atherton & Dunn

Mr. Atherton, admitted to practice in California in 1957, is a trial lawyer. He was formerly City Attorney for the City of Mountain View, and has been active in various Bar committees dealing with land use regulation.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,
Appellants,

vs.

CITY OF TIBURON,
Appellee.

On Appeal From The Supreme Court of California

BRIEF OF AMICUS CURIAE HALF MOON BAY PROPERTIES, INC. IN SUPPORT OF APPELLANTS

HOWARD N. ELLMAN
KENNETH N. BURNS
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February 20, 1980

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,
Appellants,

vs.

CITY OF TIBURON,
Appellee.

On Appeal From The
Supreme Court of California

BRIEF OF AMICUS CURIAE HALF MOON BAY PROPERTIES, INC. IN SUPPORT OF APPELLANTS

We file this brief on behalf of *amicus curiae* Half Moon Bay Properties, Inc., a Delaware corporation ("HMBP")[1] in support of Appellants, Donald W. Agins and Bonnie G. Agins (collectively "Agins").

Note: In quotations, footnotes are omitted and emphasis is supplied or omitted by us unless otherwise indicated.

[1]Counsel for both parties have granted consent to submission of this brief pursuant to Supreme Court Rule 42. We have lodged the original letters of consent with the Clerk of this Court and have included copies of the letters in Appendix A.

STATEMENT OF INTEREST AND POSITION OF AMICUS CURIAE

HMBP owns 7,550 acres of land in San Mateo County, California.[2] The ordinances which control development of that land purport to permit certain uses as do the ordinances which restrict development of the Agins' property. However, these permitted uses are all illusory.

Through state and local land use regulations similar to those applied by the City of Tiburon to the Agins' property, the County of San Mateo and the City of Half Moon Bay have restricted HMBP to development of a *maximum* of 59 residential dwellings on 7,510 of those acres.[3]

As a consequence, HMBP has become expert in the subtle, many and varied ways local governments apply California planning and subdivision law to prevent all use of property. HMBP can, we think, contribute substantially to an exposition of these issues before the Court.

The California planning process works to confront property owners with an endlessly shifting set of standards and controls so that uses apparently permitted (such as agriculture in the case of HMBP and low density residential in the case of Agins) are actually strictly prohibited or rendered economically unfeasible through the application of related regulation. These standards and controls are so pervasive and complex that a decree invalidating an unduly restrictive regulation would not vindicate the rights violated unless the court were willing to retain jurisdiction and perform the land use planning function itself.

[2]All acreages are approximate.

[3]The remaining 40 acres may be used for commercial and industrial purposes.

Accordingly, we believe compensation is the only workable remedy.

More significantly, HMBP can demonstrate that the fundamental fear which prompted the court below to stand existing law on its head—the purported "chilling effect" of compensatory awards in cases where land use regulation becomes unduly restrictive—is baseless. By providing a simple administrative remedy in its land use planning ordinance, a local government can protect itself from liability for compensation resulting from the unintended or unexpected impact of its regulations. (*Post,* Argument, Part B.2.) Since this procedure can be adopted as an urgency measure to take immediate effect, the Court may reverse and remand this case secure in the knowledge that the constitutional rights of private property owners have been preserved without exposing local California governments to any greater risk of liability than they now face.

In order to place in perspective the interest of HMBP in this case and its ability to contribute to an exposition of the issues presented, we describe briefly its land holdings and the restrictions to which they have been subjected.

HMBP's lands are, like Agins', located in the San Francisco Bay Area within accepted commuting distance of centers of employment. The region currently experiences a severe housing shortage with rapidly escalating housing costs.

Six thousand seven hundred acres are under the jurisdiction of the County of San Mateo. Under prior County plans, in effect until the early 1970's, this property was planned for development of approximately 6,000 residen-

tial dwelling units with related support and service commercial facilities. *Such development was officially considered to be and was in fact feasible in all respects.* Current County regulation, however, has zoned 4,640 acres "Open Space" and placed these lands under study for restriction to exclusively agricultural uses. Another 1,700 acres have been designated "park" on the adopted County General Plan. Two hundred more acres are already restricted to agriculture. The remaining 160 acres are designated for "urban use"; but of those, 120 acres may be divided into only 22 residential lots. The remaining 40 acres bears an "industrial and commercial" use designation. In summary then, on the 6,700 acres owned by HMBP under the jurisdiction of the County, *22 residential dwelling units are permitted and 40 acres may be developed for industrial and commercial purposes,* the balance essentially being restricted to agriculture and park uses.

Eight hundred fifty acres of HMBP's lands lie within the City of Half Moon Bay. This property is currently zoned for 1,050 dwelling units although the general plan probably restricts overall density to 900 units. Development to these densities is feasible. But a currently pending plan will restrict development *to a total of 37 dwelling units.* Under Calif. Govt. Code § 65858, the pending 37 dwelling unit limitation prevails since no development can occur which will conflict with it. Restriction to 37 units is supposed to promote agricultural use on the balance of HMBP's lands.

Restriction of lands to agriculture *appears* to allow a use. That appearance misleads. Although the soils might accommodate commercial agriculture, water supplies are

inadequate and essential agricultural infrastructure is totally lacking.[4] Official reports confirm that commercial agriculture is not viable within the County or the City except for limited production of flowers for decorative and nursery purposes.[5] This type of agricultural enterprise uses large quantities of scarce water and energy resources and requires extensive land grading as well as pesticide, herbicide and chemical fertilizer applications. The market could not absorb the product which would result if only a minor fraction of the lands of HMBP were devoted to floriculture, even if it be assumed that sufficient water could be found and the agricultural practices required by floriculture were permitted. However, other regulations of County and State agencies prohibit such practices and prevent development of essential water supplies. In short, agricultural use is economically unfeasible;[6] and nothing else is allowed.

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[4]The use of land on the coastside of San Mateo County for agricultural purposes would be economically unfeasible even if adequate water supplies and an agricultural infrastructure were available and land values and carrying costs, such as property taxes, were excluded from the equation, since the costs of existing and potential sources of water are 4 to 20 times greater than the cost of water elsewhere in California and all of the major crops which can be grown on the coastside will grow in other regions of California. John M. Sanger Associates, Inc., AGRICULTURE, A STUDY PAPER FOR PUBLIC REVIEW AND COMMENT, HALF MOON BAY LOCAL COASTAL PROGRAM (July 13, 1979).

[5]*E.g.*, MacDonald & Smart, COASTSIDE ECONOMIC STUDY (1975), a study commissioned by the County of San Mateo.

[6]We use the term "economically unfeasible" to describe development options which would cost more to implement than the finished product would yield, *assuming a zero value for the land.* Agricultural use is "economically unfeasible" when the costs of growing the product (seed, water, fertilizer, planting, cultivation, harvesting, etc.) exceeds the gross income from sale of it. In the residential case, if local development standards result in a lot development *cost* of $100,000 or more in a market where the lot sales price would be $100,000 or less, development is "economically unfeasible."

STATEMENT OF THE CASE

The opinion below, *Agins v. City of Tiburon*, 24 Cal. 3d 266, 157 Cal. Rptr. 372, 598 P.2d 25 (1979) (Jurisdictional Statement Appendix ("Jur. Stmt. App.") 1) and the Jurisdictional Statement itself extensively state the facts. We will not expand upon that statement except for purposes germane to the argument we make below.

The Agins' Complaint alleges that the ordinance implementing the open space plan which "forever prevented the development for residential use or otherwise" (Complaint ¶ IV, Joint Appendix ("J. App.") 5):

> ". . . has completely destroyed the value of Plaintiffs' property for any purpose or use whatsoever; and the natural and proximate result of said ordinance has been to prevent any sale, use, transfer, or development thereof or any part thereof." Complaint ¶ IX, J. App. 6-7.

Tiburon's ordinances well illustrate the deceptive will-o-the-wisp quality of California land use regulation. Section 2 of Ordinance 124 N.S. (Jur. Stmt. App. 41 *et seq.*) rezoned Agins' property to "RPD-1" ("RPD" meaning Residential Planned Development). (Jur. Stmt. App. 45.) Section 2 of Ord. 124 N.S. is based upon extensive recitations of purpose contained in Section 1. For example, Section 1(b) (Jur. Stmt. App. 42) states:

> "The preservation and conservation of open space land is necessary to assure its continued availability for agricultural purposes, for the enjoyment of scenic beauty, for recreation, for protection of the ecology and environment, for the containment of urban sprawl and structuring and shaping of urban development, and for retention in its *natural or near natural state* to protect the community against hazards resulting from its disturbance by man or nature."

The other statements of purpose are uniformly consistent with the notion that the land in question should not be used for any purpose requiring change or development of any kind since such use may destroy "scenic beauty," disturb the "ecology and environment," etc. Ord. 124 N.S., § 1(c), Jur. Stmt. App. 42.

Ordinance 124 N.S. was adopted on June 28, 1973. Jur. Stmt. App. 46. On the same day, Tiburon adopted Ordinance 123 N.S. establishing the standards for the RPD-1 District and certain other districts referred to in Section 2 of Ord. 124 N.S. (Jur. Stmt. App. 40.) Section 10-4(C) of Ord. 123 N.S. states that: "One-family dwellings" are *"Allowed By Right"* in RPD-1 Districts. Jur. Stmt. App. 31. Section 10-4(D)(1) states that "density shall be not less than .2 nor more than 1 dwelling unit per gross acre, *subject to the provisions of § 10-4(F)"*. Jur. Stmt. App. 32. The court below concluded that these provisions allowed Appellants to have "by right" at least one dwelling unit on their five acres. 24 Cal. 3d at 271. From this conclusion the court determined, notwithstanding the allegations of Agins' Complaint to the contrary, that they had an economic and beneficial use for their land. The court below was wrong, and for two reasons.

First, it ignored the conditions of § 10-4(F), to which the density provision is "subject." That section requires preparation of a "Master Plan" under § 10-4(G) (Jur. Stmt. App. 32), which states:

> "No building permit shall be issued for improvements of any type until a Master Plan and Precise

> Plan for the development have, after public hearing, been approved by resolutions of the Planning Commission, and only until after the City Council, after Public hearing, has by ordinance approved the Master Plan and by resolution, the Precise Plan." Jur. Stmt. App. 33.

The requirements for Master Plan and Precise Plan are too extensive to recite here, occupying three full pages of printed appendix (Jur. Stmt. App. 33-36.) Suffice it to say, however, that they require detailed and extensive planning of all public and private facilities on the subject parcel as well as all parcels in the neighborhood which might be affected by the proposed development.

Before approval of any Master Plan "affirmative findings must be made by the Planning Commission and City Council" with respect to four factors which include, among others, preservation of "*maximum* compatibility" with adjoining development and open space (§ 10-4(F)(2)), and "*maximum* effort . . . to *minimize* grading and *maximize* retention and preservation of natural elevations, ridgelands and natural features" (§ 10-4(F)(3)). Jur. Stmt. App. 32-33. Without such affirmative findings, *no development can be approved at all* on the face of the ordinance notwithstanding the apparent allowance "by right" of one family dwellings under § 10-4(C)(1). Jur. Stmt. App. 31. And under California law these sections must be construed to effectuate their purpose,[7] fulsomely recited in Ordinance 124 N.S. and in § 10-4(A) of Ordinance 123 N.S. (Jur.

[7] *Friends of Mammoth v. Mono County*, 8 Cal. 3d 247, 104 Cal. Rptr. 761, 502 P.2d 1049 (1972).

Stmt. App. 30), which include "retention of land in its *natural* or *near natural* state" and similar objectives.

In short, the California Supreme Court's conclusion that the Tiburon ordinances allow the Agins any use at all for their land is not supported on the face of the ordinance. On the contrary, the ordinance purports to allow a use "of right"—which can only be exercised after compliance with exhaustive, exhausting, complex and expensive procedures yielding the property owner nothing at the end of the exercise, unless the governing body can make specific and detailed findings that the use proposed does the *maximum* which can be done to preserve land in a "natural or near natural state." To decide that such an ordinance structure conclusively allows a property owner a use, without a trial and in the face of an allegation to the contrary, is to swallow whole a very large bill of goods indeed.[8]

The court's second error can be exposed much more simply: the facial appearance that Ordinance 123 N.S. and Ordinance 124 N.S. leave the Agins with a theoretical use

[8] Such procedural frustration of apparently permitted uses is a common feature of "open space" ordinances. Portions of HMBP's lands, for example, are subject to an open space ordinance which purports to allow low-density residential use. The number and placement of the units is determined by an elaborate "density matrix" formulation. HMBP undertook a study of one of its holdings (admittedly large in area) and discovered that to apply that formulation would require more than *five hundred days* of processing and notice periods under existing hearing and assessment procedures assuming adherence to the fastest permissible schedule. HMBP estimated that the processing cost would exceed $250,000. And at the end of the process, HMBP could easily end up with nothing—no permitted use at all—due to the County's inability or unwillingness to make the required findings of compatability between the project and "open space" objectives.

for their property does not overcome their allegation that the use is worthless for all practical purposes.[9] On demurrer that allegation requires no support—but the impossible requirements or Ord. 123 N.S. amply support it in any case.

SUMMARY OF ARGUMENT

1. When the collective effect of government regulation is to deprive a landowner of *all*[10] economically feasible use of his property, government has taken that property without just compensation in violation of the Fifth and Fourteenth Amendments. Money damages are the proper remedy for such a taking. Money damages are consistently awarded in inverse condemnations caused by government's physical interference with private lands. The rationale which underlies such awards is that when a public benefit is created by impairing an owner's use of his land, the benefitting public must share the owner's burden by paying him compensation for his loss. That rationale applies equally and especially when the taking occurs by deliberate regulation rather than invasion.

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[9]Perhaps the issue would have been more clearly framed if the Agins' Complaint had read that "notwithstanding the apparent permission on the face of Ordinance 124 N.S. to develop the subject property for at least one residential dwelling unit, the requirements imposed by Ordinance 123 N.S. and other ordinances applicable to development in the RPD-1 zone operate together forever to prevent development," etc. We submit that these refinements are fairly read into the Complaint.

[10]We do not contend that restrictions with lesser impact are constitutionally permissible. We use the definition of economic unfeasibility because it places the constitutional issue of highly restrictive land use regulation and open space zoning in stark relief —and it illustrates the degree of restriction suffered by HMBP and by the Agins, if their Complaint is taken as true on its face as it must be on this appeal.

2. The policy reasons on which the court below relied in denying compensation are, we submit, demonstrably false. Local government is not free to violate constitutional rights on the excuse that it would be too expensive to respect them. The lower court's fear—that allowing a compensation remedy will expose local governments to unexpected damage claims—does not justify a denial of compensation where local government has *deliberately* employed its regulations to prevent any use of land. Moreover, local governments can easily establish an administrative remedy under which they can remove the confiscatory effect of their regulations before the aggrieved landowner may file suit.

3. Compensation is the only effective form of relief here. The remedy to which the court below limited the Agins—a declaration that the offending ordinance is invalid—is utterly useless to vindicate the constitutional rights violated. The land use laws of California create an endlessly shifting maze of regulation in which local government can improperly prevent land use by dozens of procedural and legislative devices. Under this system any local government that wants to block use of a given land parcel can do so effectively forever, however many of its ordinances are invalidated by the courts. Unless the courts are prepared to take over from local government the entire land use planning function, compensation is the only effective remedy—as well as the traditionally preferable one.

ARGUMENT

A. Government Regulation Which Precludes All Economically Feasible Use Of Property Is A Taking Of That Property—Compensation Must Be Paid For It

The Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth, guarantees that:

> "No person shall . . . be deprived of life, liberty or property, without due process of law; *nor shall private property be taken for public use, without just compensation.*"

The court below held that Appellants may not recover just compensation even if all use of their land has been taken from them by Tiburon's regulation. Since this Court is the final arbiter of questions of federal constitutional right, the court below purported to rely on opinions of this Court in reaching its conclusion. We submit it misread the law.

1. This Court's Opinions Establish That Compensation Is A Proper Remedy For Taking By Regulation

The "taking" clause of the Fifth Amendment has, of course, applied classically to government seizure or physical invasion of private property. But the law has long been clear that governmental regulation of land use may become so onerous as to become a "taking" in the Fifth Amendment sense. As the Court stated in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413 (1922):

> "When it [diminution of property value through regulation] reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain *and compensation* to sustain the act."

The passage plainly implies that compensation is the proper remedy for taking by regulation. Despite citation in many subsequent opinions, the Court has never "explained" *Pennsylvania Coal* to mean that a property owner may not recover money damages as a remedy for regulation exceeding permissible bounds. To the contrary, the Court wrote in *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958):

> "[W]e have recognized that action in the form of regulation can so diminish the value of property *as to constitute a taking.* [Citations.] However, the mere fact that the regulation deprives the property owner of the most profitable use of his property is not necessarily enough *to establish the owner's right to compensation.*"

This statement clearly implies that compensation is an available remedy.[11]

The Court has had occasion to deal recently with questions similar to those raised by this case in *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978) and in *Kaiser Aetna v. United States,* ..... U.S. ....., 100 S. Ct. 383, 62 L. Ed. 2d 332, 48 U.S.L.W. 4045 (December 4, 1979). Neither case is directly on point, but each is illuminating on the question here in issue.

Kaiser Aetna states that the property owner has the right to recover compensation, emphasizing that (i) the

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[11] *See also Goldblatt v. Town of Hempstead,* 369 U.S. 590, 594 (1962):

> "This is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking *which constitutionally requires compensation.*"

See also United States v. General Motors Corp., 323 U.S. 373 (1945).

validity of the regulation and (ii) the entitlement of specific property owners to be compensated by reason of its application to them, *are separate questions.* 48 U.S.L.W. 4048. The court below adopted the opposite approach, combining the two inquiries into one, denying the right to compensation.

Kaiser Aetna concerned the regulatory power of Congress over national waters under the Commerce Clause rather than an exercise of police power. But the issues are essentially the same. This Court stated:

> "In light of its expansive authority under the Commerce Clause, there is no question but that Congress could assure the public a free right of access to [the navigable waters in question] if it so chose. Whether a statute or regulation that went so far amounted to a 'taking,' however, is an entirely separate question. *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922). As was recently pointed out in *Penn Central Transportation Co. v. City of New York,* 46 U.S.L.W. 4856 (1978), this Court has generally 'been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the Government, rather than remain disproportionately concentrated on a few persons.' *Id.*, at 4862." 48 U.S.L.W. at 4048, 100 S. Ct. at 390.

The passage from *Penn Central* cited in *Kaiser Aetna* also contemplates *compensation* as a remedy for excessive regulation. *Penn Central* is a zoning case, dealing with the police power of the State of New York (as *Agins* deals with the police power of the State of California) and not the commerce power.

In *Penn Central* the property owner stipulated away the decisive issue—conceding that the restriction left the property owner with an economically feasible use. The Court summarized, among the issues *not* in dispute, the following:

> "They [the property owners] accept for present purposes both that the parcel of land occupied by Grand Central Terminal must, in its present state, be regarded as capable of earning a reasonable return, and that the transferable development rights afforded appellants by virtue of Terminal's designation as a landmark are valuable, even if not as valuable as the rights to construct above the Terminal. In appellants' view none of these factors derogate from their claim that New York City's law has affected a 'taking.'" 438 U.S. at 129.

Thus the opinion is *dictum* for purposes of this case. Nonetheless, it is illuminating to examine the record in *Penn Central.* For example:

> "The [New York] Appellate Division held that the restrictions on the development of the Terminal site were necessary to promote the legitimate public purpose of protecting landmarks *and therefore that appellants could sustain their constitutional claims only by proof that the regulation deprived them of all reasonable beneficial use of the property.* The Appellate Division held that the evidence appellants introduced at trial—'Statements of Revenues and Costs,' purporting to show a net operating loss for the years 1969 and 1971, which were prepared for the instant litigation—had not satisfied their burden. First, the court rejected the claim that these statements showed that the Terminal was operating at a loss . . . . Further, the Appellate Division concluded that appellants

had failed to establish either that they were unable to increase the Terminal's commercial income by transforming vacant or underutilized space to revenue-producing use, or that the unused development rights over the Terminal could not have been profitably transferred to one or more nearby sites. *The Appellate Division concluded that all appellants had succeeded in showing was that they had been deprived of the property's most profitable use. . . .*" 438 U.S. at 119-20.

The Agins here contend that Tiburon's regulations deprive them of *all* reasonable beneficial use of their property. Complaint ¶ IV, J. App. 5.

The *Penn Central* opinion then turns to the due process question:

"[T]he Court of Appeals held that appellants' attack on the law could prevail only if the law deprived appellants of their property in violation of the Due Process Clause of the Fourteenth Amendment. *Whether or not there was a denial of substantive due process turned on whether the restrictions deprived Penn Central of a 'reasonable return' on the 'privately created and privately managed ingredient' of the Terminal.*" 438 U.S. at 121.

The Agins' Complaint here offers to show that Tiburon's regulations would deprive it of *all* return on the subject property. Complaint ¶ IX, J. App. 7.

This Court affirmed the decision of the New York Court of Appeals in *Penn Central*. The opinion stands for the proposition that a property owner who challenges the constitutionality of a land use restriction cannot make his case when he concedes that the restriction leaves him with

a reasonable return on his investment and valuable uses for his property (438 U.S. at 129). In stating the controlling principles, this Court has declared that *compensation* for economic injury flowing from excessively burdensome regulation is required when justice and fairness so dictate. Appellants contend here that they have been deprived of *all* use and *all* return, essentially the maximum burden possible under the circumstances.

2. The Rationale For Awarding Compensation Applies To Regulation Cases

The rationale for awarding damages in inverse condemnation is well known. The California Supreme Court itself stated in *Holtz v. Superior Court*, 3 Cal. 3d 296, 303, 90 Cal. Rptr. 345, 475 P.2d 441 (1970):

"The relevant 'policy' basis of [California's just compensation clause] was succinctly defined in *Clement v. State Reclamation Board* (1950) 35 Cal.2d 268, 642 [220 P.2d 897]: 'The decisive consideration is whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking.' In other words, the underlying purpose of our constitutional provision in inverse—as well as ordinary—condemnation is 'to distribute throughout the community the loss inflicted upon the individual by the making of public improvements' (*Bacich v. Board of Control* (1943) 23 Cal.2d 343, 350 [144 P.2d 818]): 'to socialize the burden . . .—to afford relief to the landowner in cases in which it is unfair to ask him to bear a burden that should be assumed by society' (Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 166 Wis.L.Rev. 3, 8)."

Accord, Albers v. City of Los Angeles, 62 Cal. 2d 250, 42 Cal. Rptr. 89, 398 P.2d 129 (1965). In *House v. L.A. County Flood Control Dist.,* 25 Cal. 2d 384, 397, 153 P.2d 950 (1944) Mr. Justice Traynor, concurring, wrote.

> "It is irrelevant whether or not the injury to the property is accompanied by a corresponding benefit to the public purpose to which the improvement is dedicated, *since the measure of liability is not the benefit derived from the property, but the loss to the owner.*"

This Court expressed the same concept in *Armstrong v. United States,* 364 U.S. 40, 49 (1960):

> "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

And again in *United States v. Willow River Co.,* 324 U.S. 499, 502 (1945):

> "The Fifth Amendment . . . undertakes to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project."

This theory upon which recovery is based—the desire to socialize burdens imposed to secure public benefit—is not rationally limited to damage directly caused by physical invasion. Consider, for example, the case at bar. Tiburon has, through its ordinances, effectively compelled the Agins to maintain their land as "open space" for the aesthetic pleasure of Tiburon's residents. Had Tiburon instead forcibly seized Agins' property and staked it out as "open space preserve", the loss to the Agins—and the benefit to Tiburon residents—would be no different. Yet the court below has denied compensation in the first case, although it clearly would be proper in the second. There is no ground in logic to justify the difference. Nor is there any ground in policy—a subject to which we next turn.

B. The "Chilling Effect" Rationale Cited Below Is A Spurious Excuse For Denying The Constitutional Right To Just Compensation. Local Governments Can Easily Protect Themselves Against Unexpected Compensation Claims

The California Supreme Court in *Agins* expressed the concern that the rule allowing a property owner compensation for unreasonable regulation would excessively burden the legitimate processes of government. 24 Cal. 3d at 275-76. We refer to the contention as the "chilling effect" limitation for the sake of convenience, adopting the terminology of the *Agins* opinion.

We feel obliged to point out first that this idea is a breathtaking assault on the concept of constitutional liberty. It has never, we submit, been the law that government may violate the Bill of Rights with impunity if it can show that compliance would be burdensome. On the contrary, the cost of complying with constitutional mandate has never been accepted as an excuse for violation.

See, e.g., Hutto v. Finney, 437 U.S. 678 (1978); *Milliken v. Bradley,* 433 U.S. 267 (1977); *Bounds v. Smith,* 430 U.S. 817 (1977). It is worth noting that the scope and extent of potential governmental liability has expanded tremendously over the last thirty years without any apparent "chilling effect" upon the equally explosive growth of government and expansion of governmental activity over the same span of time.

1. The "Chilling Effect Limitation" Is Both Irrational And Irrelevant. The Proper Inquiry Is Whether Legitimate Planning Activity Is Impeded

The argument that awards of monetary damage might have a chilling effect upon essential government activities is not a novel one in California inverse condemnation authorities. *Bacich v. Board of Control,* 23 Cal. 2d 343, 350, 144 P.2d 818 (1943):

> "It may be suggested that on the one hand the policy underlying the eminent domain provision in the Constitution is to distribute throughout the community the loss inflicted upon the individual by the making of the public improvements. . . . On the other hand, fears have been expressed that compensation allowed too liberally will seriously impede, if not stop, beneficial public improvements because of the greatly increased cost."

That passage was cited with approval in *Albers v. City of Los Angeles,* 62 Cal. 2d 250, 263, 42 Cal. Rptr. 89, 398 P.2d 129 (1965). But the *Albers* case *held* that public agencies should be *strictly liable* in inverse condemnation for physical invasions of property, whether or not the injury

could have been foreseen. By expanding the scope of liability beyond the limits of foreseeable risk, *Albers* in fact discarded the "chilling effect" rationale as a limitation upon liability in California. Since *Albers* the rule it stated has been applied to physicial invasions both transitory (*Orme v. State of California ex rel. Dept. Water Resources,* 83 Cal. App. 3d 178, 147 Cal. Rptr. 735, *hrg. denied* (1978)) and ephemeral (*Varjabedian v. City of Madera,* 20 Cal. 3d 285, 142 Cal. Rptr. 429, 572 P.2d 43 (1977)). Moreover, the invasion need only impair the *highest and best use* to be compensable.[12] Deprivation of all possibility of "reasonable return" (*Penn Central, supra,* 438 U.S. at 121) or all "reasonable beneficial use" (*id.* at 119-20) need not be shown.

In short, the "chilling effect limitation" has been wholly abandoned as a shield to damage liability in any taking case which remotely suggests physical invasion. There is no reason in logic or justice to treat differently takings accomplished through regulatory devices. The error has resulted, we submit, from a failure to distinguish *legitimate* planning activities—for which the "chilling effect" is a proper concern——from the varied abuses to which planning devices are put to effect surreptitious confiscation of land.

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[12] *Orme* awarded damages for loss of the ability to grow a rice crop for two growing seasons and for loss of the crop in the ground during the year when the conditions first arose. Rice cultivation was said to be the lands' highest and best use. 83 Cal. App. 3d at 180. There was no showing that the property had been deprived of all use—and it is reasonable to assume that it could have been used at least for pasturage or some other similar purpose.

We submit, therefore, that attempts to define liability in terms of a "chilling effect" limitation direct the inquiry toward an irrelevancy. The real effort should be to define the *legitimate scope of planning activity* to which all property must be held subject. This brief does not purport to set forth an exhaustive definition of the term. We do, however, contend that no view of the "legitimate scope of planning activity" can be consistent with constitutionally protected property rights and, at the same time, encompass any of the following cases:

(a) The regulations leave the property owner with nothing but economically unfeasible uses for his property and the degree of restriction is or ought to be known to the regulating authority in the exercise of reasonably diligent inquiry;

(b) The regulations have not been adopted or applied in good faith (which would include a case where uses purportedly allowed were frustrated by byzantine procedures and impossible findings requirements);

(c) Public facilities and services essential to an economically feasible use of the property have been deliberately withheld; or

(d) The property owner's commitment and degree of loss is in large part a reflection of inducements provided by the regulating body under circumstances where it would be inequitable to allow the inducements to be withdrawn without compensation.[13]

[13]A view adopted in part by the California Supreme Court in *Furey v. City of Sacramento*, 24 Cal. 3d 862, 157 Cal. Rptr. 684, 598 P.2d 884 (1979), a case which invalidated an agricultural zone restriction.

Awards of compensation where any one of the foregoing showings can be made would not "chill" legitimate planning activities.[14]

2. California Planning Authorities Can Totally Protect Themselves By Ordinance Against "Surprise" Claims For Compensation

Local governing bodies have ample opportunity to protect themselves against the possibility that they may have exposed themselves to liability for compensation inadvertently—that they may have misunderstood the impact of their regulation upon a particular property owner. By providing for an administrative remedy in their ordinance, they gain control of the initial adjudication in a process which could purge the ordinance of its unconstitutional impact. Such an ordinance would provide that no property owner could file a suit for compensation in inverse condemnation without *first* applying for a conditional use permit for a use sufficient to provide an economic return in the manner most consistent with the goals and objectives of the applicable restrictions.

A property owner would be required to exhaust the administrative remedy. That exercise would allow the local governing body to evaluate its potential exposure with the

[14]We submit that an analysis directed toward an attempt to define the scope of legitimate planning activity is more useful than an attempt to determine whether or not a plan has been "implemented" (compare *Jones v. People ex rel. Dept. of Transportation*, 22 Cal. 3d 144, 148 Cal. Rptr. 640, 583 P.2d 165 (1978) with *Selby Realty Co. v. City of San Buenaventura*, 10 Cal. 3d 110, 109 Cal. Rptr. 799, 514 P.2d 111 (1973)) or whether the action complained of deprives a property owner of something which has historically been viewed as an "incident of real estate" such as a right of access as in *Jones* or in a right to grow crops as in *Orme*. *See, e.g., Orme, supra*, 83 Cal. App. 3d at 138 n. 3.

property owner required to make his entire showing. Failure to exhaust the administrative remedy would preclude resort to the courts. *State of California v. Superior Court (Veta Co.)*, 12 Cal. 3d 237, 115 Cal. Rptr. 497, 524 P.2d 1281 (1974); *Abelleira v. District Court of Appeal*, 17 Cal. 2d 280, 109 P.2d 942 (1941). Under California law, the mere *existence* of an administrative remedy precludes a direct judicial attack, even when the plaintiff seeks to raise questions concerning the constitutional right of the administrative agency to exercise any jurisdiction at all vis-a-vis the subject matter. *South Coast Regional Comm'n v. Gordon*, 18 Cal. 3d 832, 135 Cal. Rptr. 781, 558 P.2d 867 (1977); *Metcalf v. County of Los Angeles*, 24 Cal. 2d 267, 148 P.2d 645 (1944).

And the exhaustion doctrine requires more than simply a perfunctory showing. The applicant must raise all issues and arguments before the administrative tribunal to preserve them for judicial review. *Bohn v. Watson*, 130 Cal. App. 2d 24, 278 P.2d 454 (1954), *hrg. denied* (1955). California statutes authorize California cities and counties to impose such a procedural gloss on their zoning ordinances by urgency measure adopted without notice. Calif. Govt. Code § 65858.[15]

[15]It is possible that conditionally permitted uses sufficient to avoid inverse condemnation exposure might conflict with applicable general plans. Although use permits may be issued without a finding of general plan conformity (*Hawkins v. County of Marin*, 54 Cal. App. 3d 586, 126 Cal. Rptr. 754, *hrg. denied* (1976)), zoning ordinances must conform. Calif. Govt. Code § 65860. Again, however, general plans may be amended and planning agencies can initiate the change. The California Environmental Quality Act (Pub. Res. Code § 21000 and following) requires environmental assessment prior to adoption of a general plan or zoning ordinance but procedural amendments, *per se*, have no measurable environmental impact. Applications for use permit, of course, would be subject to environmental assessment on a detailed basis.

In short, California governmental entities have at their disposal, *and under their legislative control*, a tool to which they can immediately resort to minimize (if not eliminate entirely) the exposure arising out of possible claims associated or resulting from the unexpected or unintended impact of their regulations. This procedure would allow each governmental agency to hear a property owner's claim in a quasi-judicial proceeding,[16] and, if it found the claim persuasive, allow a land use which would preclude exposure to inverse condemnation liability.

An administrative procedure would not preclude judicial review.[17] It would absolutely prevent, however, any claim that the processes and functions of government were suffering inhibition due to the threat of undefined and unmeasureable claims, assertable without warning or opportunity to adjust the applicable planning constraints.

[16]*Horn v. County of Ventura*, 24 Cal. 3d 605, 156 Cal. Rptr. 718, 596 P.2d 1134 (1979); *Ward v. County of Riverside*, 273 Cal. App. 2d 353, 78 Cal. Rptr. 46 (1969). This rule is not unique to California. See, *e.g.*, *Snyder v. City of Lakewood*, 542 P.2d 371 (Colo. 1975); *West v. City of Portage*, 392 Micn. 458, 221 N.W.2d 303 (1974); *Fasano v. Board of County Commissioners*, 264 Or. 574, 507 P.2d 23 (1973); and *Fleming v. City of Tacoma*, 81 Wn. 2d 292, 502 P.2d 327 (1972).

[17]There would be no trial *de novo* in the state courts. Review would be by administrative mandamus under Calif. Code of Civ. Proc. § 1094.5. *See, e.g., Winkelman v. City of Tiburon*, 32 Cal. App. 3d 834, 108 Cal. Rptr. 415 (1973). The court would probably review such a case by the "independent judgment" as opposed to the "substantial evidence" test under Calif. Code of Civ. Proc. § 1094.5(c). *Strumsky v. San Diego County Employees Retirement Assn.*, 11 Cal. 3d 28, 112 Cal. Rptr. 805, 520 P.2d 29 (1974).

C. Compensation Is The Only Practical Remedy When Government Takes Land By Regulation. The Regulatory Structure Is So Complex, Interdependent, And Time-Consuming That Declaratory Relief Will Never Suffice Against A Local Government Which Desires To Prevent Use Of Land

For many years local governing bodies have used land use controls and restrictive development standards to serve purely local interests. Most of the commentary decrying this phenomenon has related to regulations which drive out all but the most expensive forms of housing development. As this commentary foretells, however, "open space" zoning represents simply one more turn of the same screw to serve the same interests. The impact of that zoning falls upon those such as the Agins and HMBP who have been chosen to act as keepers of the public open space at their own expense.

We first review this commentary. We then summarize California land use planning and development control law to demonstrate the rich arsenal available to those who seek to impose constraints upon property which deprive property owners of all economic use. This material illustrates the purpose and means by which property owners are affected. It also demonstrates that compensation is the only practical remedy. Elimination of a restriction does not *ipso facto* authorize development, nor does it preclude the substitution of a new and equally onerous restriction. It does not prevent the adoption of a legislative moratorium to restudy an aspect of the control scheme thereby suspending an approval procured when a particular restriction is invalidated. Thus, in all but the most simple cases, a

decree declaring invalid a particular restriction would not vindicate the rights violated unless the court were willing to retain jurisdiction and virtually perform the land use planning function itself.

1. Land Use And Development Constraints Are Fashioned To Serve Local Interests And Operate By Restrictive Interaction To Achieve Purely Local Ends

The President's Committee on Urban Housing, in its report entitled A Decent Home (1968), wrote (at 142):

> "In many urban communities, the net effect of public land policies is to reduce the supply of land available for modest-cost housing and thus to increase its cost. Zoning and subdivision regulations are the most obvious policies having this effect. . . ."

The National Commission on Urban Problems noted in its report, Building The American City (1968), the obvious political thrust of open space and low density zoning schemes:

> "Most communities want all cream and no skim milk. They want the best, not only in physical structures and facilities, but also in the economic levels of people who will become their future citizens. . . . Each community engages in 'one-upmanship,' attempting to outdo its neighboring communities." *Id.* at 19.
>
> "Splintered governments thus operate toward increasing disparity in fiscal capacity, as well as toward narrow and parochial local policies of zoning, governmental service, and taxation." *Id.* at 330. See also A Decent Home 49.

More recently, the Rockefeller Brothers Fund Report, THE USE OF LAND: A CITIZENS' POLICY GUIDE TO URBAN GROWTH (1973), observed that the same policies continue to prevail. If anything, they are getting steadily worse and affecting fundamental values of our society.

> "In the midst of a mobile and expanding population, local governments represent the people already there. Prospective residents, who may be destined to double or treble the population of the community, do not live within local boundaries and therefore do not vote. The local government thus speaks for the people who got there first.
>
> "Many of these first arrivals have recognized for many years that additional development has little to offer them. Some suburbs have engaged in a curious intermunicipal competition in which development (particularly low- or moderate-income housing) has been perceived as the common enemy, threatening to overrun the weak or inattentive locality. Municipal efforts to combat the threat have resembled nothing so much as competitive dikebuilding by neighboring landowners, each hoping that his higher dikes will keep the floodwaters off his own land and drive them onto his neighbors' instead. Even ten or fifteen years ago, local officials would privately explain that a new zoning amendment increasing minimum lot sizes was at least partly intended to keep up with requirements in a neighboring town." *Id.* at 225-226.

The commentaries lament the loss of housing opportunity resulting from overly restrictive development control procedures. But those deprived of housing (or forced to pay a higher price for it due to constricted supply) are

only indirectly affected. The property owner whose land is restricted bears the full brunt of the regulation.

In the case of HMBP, for example, local officials have decreed that it will be the unwilling custodian, at its own expense, of more than 10 square miles of open space to serve the current fancy of local residents to be surrounded by open space without the necessity of paying for it or even the cost of maintaining it. It is not that the lands so restricted cannot be developed in a manner consistent with sound planning principles, or that housing is unneeded. Quite the opposite. The restriction proceeds directly from the perception of people already there that the status quo should be preserved to benefit those who like things as they are—particularly when they can contrive to have the direct out-of-pocket costs and the lost opportunity cost borne by others.

California land use laws are uniquely well suited to the fashioning of development controls in a manner calculated to preserve the status quo. We turn to a discussion of those controls to demonstrate their intricacy, prevasive character and the ephemeral nature of any approval a property owner or developer might obtain.

2. The Structure Of California Land Use Planning Law

(a) *The General Plan.*

All land use and development restrictions imposed under California law are controlled by a comprehensive general plan which must be prepared by each City and County. Calif. Govt. Code § 65300. Because of the consistency requirements described below, inadequacy of any General

Plan Element or suspension of an element for amendment or study suspends the right to approve anything.

Calif. Govt. Code § 65300.5 expresses the legislative intent as follows:

> "In construing the provisions of this article [Article 5 pertaining to general plans], the Legislature intends that the general plan and elements and parts thereof comprise an integrated, internally consistent and compatible statement of policies for the adopting agency."

A general plan consists of mandatory and optional "elements." Calif. Govt. Code § 65302 lists and describes the mandatory elements which are (a) land use, (b) circulation, (c) housing, (d) conservation, which includes subelements of (i) land and water reclamation, (ii) flood control, (iii) prevention of pollution, (iv) water course preservation, (v) erosion control, (vi) water protection, (vii) rock, sand and gravel resource quantification; (e) open space; (f) seismic safety; (g) noise control; (h) scenic highway; and (i) a safety element.

Many of these elements must be developed in great detail. For example, Calif. Govt. Code § 65302(a) states that the land use element must designate:

> ". . . the proposed general distribution and general location and extent of the uses of the land for housing, business, industry, open space, including agriculture, natural resources, recreation, and enjoyment of scenic beauty, education, public buildings and grounds, solid and liquid waste disposal facilities and other categories of public and private uses of land. The land use element shall include a statement of the standards of population density and building intensity recommended for the various districts and other territory covered by the plan. The land use element shall also identify elements covered by the plan which are subject to flooding and shall be reviewed annually with respect to such areas."

The noise element (Calif. Govt. Code § 65302(g)) requires that sources of noise be quantified and noise contours be developed with respect to specific decibel limitations. Other elements must be refined to a similar degree of mandatory detail.

Once adopted, a general plan may be supplemented or changed. Calif. Govt. Code § 65356.1. The Code contains limitations on amendment of mandatory elements of a general plan (Calif. Govt. Code § 65361) but does not limit the imposition of optional requirements.

All subsequent zoning and land use control enactments *must be found to conform to the general plan* without distinction between its mandatory and optional elements. Calif. Govt. Code § 65860. *Suspension of any part of the plan suspends the entire process.*

(b) *The Specific Plan.*

As an adjunct to the general planning power, the California Planning Act authorizes preparation of specific plans as may "be required for the systematic execution of the general plan" Calif. Govt. Code § 65450. A specific plan can deal with any subject matter necessary or convenient to the implementation of the general plan. Calif. Govt. Code § 65450.1. As its name implies, the specific plan concept provides a vehicle for the local governing body to define the precise location and nature of all uses which will be permitted in a particular area, defining development control down to lot size, permissible types

of construction and the location of all allowed uses. Calif. Govt. Code § 65451.

Local agencies are granted broad discretion in implementing and carrying out specific plans. See Calif. Govt. Code § 65550 *et seq.* Generally, however, no public improvement (such as a street, road or drainage facility) can be approved without an express finding of conformity to any applicable specific plan. *See* Calif. Govt. Code §§ 65552, 65553. Since development typically requires construction of public improvements, these sections virtually require that development proposals conform to the specific as well as general plans. Other requirements we will describe below operate similarly.

(c) *The Open Space Element.*

As noted above, an open space element is a mandatory component of a general plan. Article 10.5 of Chapter 3, Division 1, Title 7 of the Calif. Govt. Code (§ 65560 *et seq.*) establishes an elaborate series of separate requirements for the open space element of a general plan. These include a requirement that local agencies inventory all open space resources (a euphemism for all undeveloped land, See Calif. Govt. Code § 65560(b)) and adopt a specific "action program" to carry out the open space plan. Calif. Govt. Code § 65564. The action program may be implemented or refined by a specific plan.

Calif. Govt. Code § 65567 provides that:

> "No building permit may be issued, no subdivision map approved, and no open-space zoning ordinance adopted, unless the proposed construction, subdivision or ordinance is consistent with the local open-space plan."

Under this provision, mere identification of a particular parcel of property as a valuable open space resource in the community could prevent use of the property as a site for any structures or for any development purpose due to the consistency requirement.

Inadequacy of the open space element or suspension for "study" stops everything. An attack on the adequacy of the element calls every permit issued since its adoption into question. *Save El Toro Assn. v. Days,* 74 Cal. App. 3d 64, 141 Cal. Rptr. 282 (1977).[18]

(d) *Zoning Ordinances.*

Calif. Govt. Code § 65800, and following, provides for adoption of zoning ordinances under the umbrella of a statement of intent to the effect that:

> ". . . the Legislature declares that in enacting this chapter it is its intention to provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters."

Under Calif. Govt. Code § 65860, however, zoning ordinances must conform to applicable general plans.

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[18]Litigation to challenge the adequacy of general plans, conformity of ordinances and other acts with general plan requirements, compliance with required procedures and adherence to environmental processing requirements is immeasurably encouraged by the total absence of any meaningful standing requirement in California. As a result, any citizens group with a filing fee can bring the whole process to a halt pending the outcome of the litigation. *See, e.g., No Oil, Inc. v. City of Los Angeles,* 13 Cal. 3d 68, 118 Cal. Rptr. 34, 529 P.2d 66 (1974); *Topanga Assn. For A Scenic Community v. County of Los Angeles,* 11 Cal. 3d 506, 113 Cal. Rptr. 836, 522 P.2d 12 (1974); *Friends of Mammoth v. Mono County,* 8 Cal. 3d 247, 502 P.2d 1049 (1972); *Mountain Defense League v. Board of Supervisors,* 65 Cal. App. 3d 723, 135 Cal. Rptr. 588 (1977).

(e) *Subdivision Approval.*

The California Subdivision Map Act, Calif. Govt. Code § 66410 *et seq.*, applies to any division of land "for the purpose of sale, lease or financing, whether immediate or future." Calif. Govt. Code § 66424. As a practical matter, this broad definition brings under the California Subdivision Map Act almost every conceivable type of land development activity other than an application for a building permit on an already divided and approved lot.

Calif. Govt. Code § 66473.5 provides that:

> "No local agency shall approve a [subdivision] map unless the legislative body shall find that the proposed subdivision . . . is consistent with the general plan . . . ."

Calif. Govt. Code § 66474 provides:

> "A legislative body of a city or county shall deny approval of a final or tentative map if it makes any of the following findings:
>
> "(a) That the proposed map is not consistent with applicable general and specific plans.
>
> "(b) That the design or improvement of the proposed subdivision is not consistent with applicable general and specific plans.
>
> "(c) That the site is not physically suitable for the type of development.
>
> "(d) That the site is not physically suitable for the proposed density of development.
>
> "(e) That the design of the subdivision or the proposed improvements are likely to cause substantial environmental damage . . . ."
>
> "(f) That the design of the subdivision or the type of improvements is likely to cause serious public health problems . . . ."

Subsections (c), (d), (e) and (f) reopen for reconsideration, in the context of a specific subdivision proposal, matters which should already have been resolved at the general and specific plan stages. The fact that specific findings must be made on these issues, *in addition to findings of conformity with the specific and general plan,* evinces a legislative intent to allow such fresh inquiry and re-evaluation.

(f) *The Blanket Moratorium Provision.*

In addition to the right of the city or county to rethink its general plan and specific plans in the context of a specific subdivision proposal, Calif. Govt. Code § 65858 sanctions suspension of development authorization by urgency measure adopted without notice. That section provides:

> "Without following the procedures otherwise required preliminary to the adoption of a zoning ordinance [which provisions include notice and public hearing, *see, e.g.,* Calif. Govt. Code § 65856], the legislative body, to protect the public safety, health and welfare, may adopt as an urgency measure an interim ordinance prohibiting any uses which may be in conflict with a contemplated zoning proposal which the legislative body, planning commission or the planning department is considering or studying or intends to study within a reasonable time. . . ."

Under this remarkable procedure, a factor as inchoate as planning department *intention* to study an element of the general plan at some "reasonable time" in the future can operate to prohibit *any use* which might conceivably conflict with *any proposal* which might be produced by *any such study* if it is ever undertaken. The statute

authorizes continuation of the moratorium for a period of up to two years. Such procedures have been upheld on judicial review. *See Metro Realty v. County of El Dorado,* 22 Cal. App. 2d 508, 35 Cal. Rptr. 480 (1963).

(g) *The Elimination Of Vested Rights*

Under the foregoing structure, a parcel of land, such as that owned by HMBP or the Agins, could be approved for development under the applicable general plan, a specific plan, applicable zoning ordinances and an approved subdivision map and still be subject to moratorium or revocation of the use permissions. Under California law, a prior approval does not confer a vested right to build unless a building permit has been obtained. *Avco Community Developers, Inc. v. South Coast Regional Comm'n,* 17 Cal. 3d 785, 132 Cal. Rptr. 386, 553 P.2d 546 (1976), *appeal dismissed,* 429 U.S. 1083 (1977); *Oceanic California, Inc. v. North Central Coast Regional Comm'n,* 63 Cal. App. 3d 57, 133 Cal. Rptr. 664, *hrg. denied* (1976), *appeal dismissed,* 431 U.S. 951 (1977).[19]

[19]In *Youngblood v. Board of Supervisors,* 22 Cal. 3d 644, 150 Cal. Rptr. 242, 586 P.2d 556 (1978), the California Supreme Court held that a tentative subdivision map approved prior to adoption of a general plan amendment fixed and established the parameters by which the final subdivision map would be controlled even though the final map would conflict with the then applicable general plan. In effect, the subdivider acquired vested rights to complete the subdivision process as against the subsequent general plan change. But completion of the subdivision process will give him no assurance of the right to use the lots for their intended purpose. Fully subdivided lots creating legal building sites when the subdivision occurred have been held expressly subject to subsequently enacted regulations which, for all practical purposes, render the lots no longer usable as building sites. *Oceanic California Inc. v. North Central Coast Regional Comm'n, supra; Hill v. Manhattan Beach,* 6 Cal. 3d 279, 98 Cal. Rptr. 785, 491 P.2d 369 (1971).

Even a building permit does not protect the property owner totally. If the permit is invalid, the structure built in reliance upon it remains subject to abatement, regardless of the property owner's good faith. *Pettitt v. City of Fresno,* 34 Cal. App. 3d 813, 110 Cal. Rptr. 262 (1973). And, of course, the permit's validity can be called into question by an attack upon the open space element with which the permit must conform. Calif. Govt. Code § 65567.

3. Summary Of California Land Use Controls

This discussion of California land use law only begins to reveal its complexity. The reality is much worse. We have, for example, not even considered here the interconnection of these laws with the requirements of the California Environmental Quality Act (Calif. Pub. Res. Code §§ 21000 *et seq.*) or the California Coastal Zone Conservation Act (Calif. Pub. Res. Code §§ 27000 *et seq.*).

It should, however, be clear that California law expressly authorizes continuous re-examination of development approval standards at least until a valid building permit has been issued for each structure in the development, no matter how detailed the prior approvals might have been. See, *e.g.,* the precise and exacting standards required under Appellee's Ordinance 123 N.S., § 10-4(G) (Jur. Stmt. App. 33 *et seq.*). Approval of one structure does not create any right to approval of another or any protection against suspension of any approval no matter how often it may have been officially reiterated. *Frisco Land & Mining Co. v. State of California,* 74 Cal. App. 3d 736, 141 Cal. Rptr. 820 (1977), *hrg. denied* (1978).

A landowner may have a comprehensive development proposal specifically approved through a general plan amendment, adoption of a specific plan, adoption of implementing zoning ordinances, approval of tentative subdivision maps (in a procedure in which the entire rationale of the applicable general and specific plans can be reconsidered in the light of the specific development proposal)—and the approval thus obtained is essentially ephemeral, subject to summary suspension and revocation without notice or opportunity to be heard. To achieve the approval through general plan, specific plan, zoning ordinance and subdivision processing while complying with applicable environmental reporting requirements, the proposal will be subject to several full public hearings and intensive processing delay, depending upon the degree of local controversy.

4. A Decree Of Invalidity Is A Meaningless Remedy In This Context

A review of California's regulations demonstrates that it would be impossible for a court in the typical case to grant effective relief by a decree invalidating a specific restriction. For example, if a landowner encountered a subdivision map denial under Calif. Govt. Code § 66474(c) on the grounds that the development site was "not physically suitable for the type of development" notwithstanding its compliance with the applicable general plan and specific plan, a court could, upon a finding that such denial violated the owner's constitutional rights, order approval of the subdivision map. This decree would not prevent, however, an urgency moratorium adopted under Calif. Govt. Code §65858 to study

the possibility of a change in the general plan, specific plan or applicable zoning ordinance to accommodate the considerations of physical suitability which prompted the finding. It would not prevent suspension of the open space element for further study thus preventing issuance of building permits. Calif. Govt. Code § 65567.

To put it bluntly, if local government desires to prevent use of the land it has an arsenal of procedures guaranteed to consume years of the owner's time and thousands of his dollars.

The court, of course, might choose to retain jurisdiction and act as a super planning agency itself. Courts have such powers and have occasionally exercised them. *See, e.g., Gautreaux v. Chicago Housing Authority,* 296 F. Supp. 907 (N. D. Ill. 1969), *decree granted,* 304 F. Supp. 736 (N. D. Ill. 1969), *aff'd,* 436 F.2d 306 (7th Cir. 1970), *stay denied,* 401 U.S. 953 (1971); *Berenson v. Town of Newcastle,* 38 N.Y.2d 102, 378 N.Y.S.2d 672, 341 N.E.2d 236 (1975). But it is an extremely ambitious adventure, rarely tried.

More fundamentally, this situation stands the primary rule of equity on its head. For here (unlike *Gautreaux* and *Berenson*) we have a context in which *the injury can be adequately compensated by an award of money damages.* Indeed, money damages provide the traditional form of relief. It is the *defendant* who argues[20] that an award of money damages threatens it.

---

[20]Erroneously. See *ante,* Part B.2.

CONCLUSION

This Court should reverse the decision of the California Supreme Court. It should hold that regulations which deprive property owners, such as the Agins, of all economically feasible uses of their property violate their rights under the Fifth and Fourteenth Amendments of the United States Constitution. The Court should state that the *impact* of a regulation cannot be determined from the face of the regulation—that the purported allowance of a use does not establish that the use so allowed is *ipso facto* sufficient to fulfill constitutional requirements. And where the burden of the restriction exceeds constitutionally permissible limits, the Court should declare that monetary compensation for the property owners' loss is the proper remedy.

Dated: February 20, 1980

Respectfully submitted,

HOWARD N. ELLMAN
KENNETH N. BURNS
MICHAEL J. BURKE
ELLMAN, PASSOVOY & BURKE

By HOWARD N. ELLMAN
Attorneys for Amicus Curiae Half Moon Bay Properties, Inc.

APPENDIX A

APPENDIX A

Law Offices
Pollock, Williams & Berwanger [Letterhead]

January 18, 1980

Half Moon Bay Properties
c/o Ellman, Passovoy & Burke
One Ecker Bldg.—Suite 210
Ecker & Stevenson Streets
San Francisco, CA 94105

Re: Agins v. City of Tiburon
United States Supreme Court
No. 79-602

Gentlemen:

This is in response to your request for my consent to your filing a brief *amicus curiae* in the above-captioned case now pending before the United States Supreme Court. On behalf of the attorneys for the Appellant in that case, I hereby give such consent.

Very truly yours,

/s/ JOHN P. POLLOCK

for Pollock, Williams & Berwanger

JPP:jb

cc: Gideon Kanner, Esq.
Reginald Hearn, Esq.

City of Tiburon

Office of the City Attorney [Letterhead]

January 21, 1980

Kenneth N. Burns, Esq.
Ellman, Passovoy & Burke
Attorneys at Law
One Ecker Bldg., Suite 210
San Francisco, CA 94105

Re: Agins v. City of Tiburon
U. S. Supreme Court No. 79-602

Dear Mr. Burns:

You have advised that you represent Half Moon Bay Properties and that you wish to file an amicus brief in the U. S. Supreme Court on behalf of your client.

Please be advised that you have permission of Appellee, the Town of Tiburon, to file an amicus brief in the above.

Very truly yours,

/s/ Robert I. Conn
Robert I. Conn
Town Attorney

RIC/njt
cc: Mr. John P. Pollock
cc: Mr. Reginald G. Hearn
cc: Mr. Gideon Kanner

Supreme Court, U. S.
FILED
FEB 21 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,

Appellants,

vs.

CITY OF TIBURON,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF OF GLENDALE FEDERAL SAVINGS AND LOAN ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF APPELLANTS

[Consents To The Filing Of The Within Brief Attached As Appendix "A"]

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I

QUESTION PRESENTED

The question to which this brief is addressed is whether a state court can abrogate a remedy guaranteed by the Constitution of the United States and recognized by numerous decisions of the Federal judiciary, and, in particular:

1. Whether it is constitutionally permissible for a state court to hold that payment of just compensation for the taking of private property for a public use, provided for by the Fifth and Fourteenth Amendments, is *never* available as a remedy to a property owner who complains of such taking by means of a governmental regulation which effectively deprives him of his property?

2. Whether it is constitutionally permissible for a state court to hold that the *only* remedy available to landowners whose property has been taken by a governmental regulation effectively depriving them of their property is judicial invalidation of such regulation?

II

INTEREST OF AMICUS CURIAE

This brief is presented in order to provide the Court with an exemplar of what actually happens to the owners of undeveloped real property in a legal atmosphere in which governmental entities can, by regulation, deprive said owners of the right to utilize and develop their property without any fear of being called upon to pay compensation.

Glendale Federal Savings and Loan Association ("Glendale Federal"), an instrumentality of the United States of America, is a mutually-owned federal savings and loan association chartered by the Federal Home Loan Bank Board and having its main office in Glendale, California. Its principal business is the making of loans, repayment of which is secured

by deeds of trust on real property; and from time to time, as a consequence of foreclosure proceedings occurring under such deeds of trust, Glendale Federal, through legal process, becomes the fee owner of the real property.

In August of 1971, at a trustee's sale foreclosing a deed of trust of which it was beneficiary, Glendale Federal acquired for a foreclosure bid of more than $6,000,000, and thus became the owner of, a largely unimproved parcel of approximately 1,700 acres located in, and comprising approximately 35% of the undeveloped land area of, the City of San Juan Capistrano ("the City"), County of Orange, California ("the subject property").

Unless it is purchased or acquired through eminent domain by the City or other governmental entity, the reasonable and economically feasible use for the subject property is as a site primarily for residential development.[1] (There is, and for many years has been, a critical need for housing in the Orange County area, including the City.) Although the City desires to preserve the subject property for "open space", neither it nor any other governmental entity is (or for the past decade has been) willing and able to acquire the subject property by any means which would require the payment of just compensation therefor. Nevertheless, and despite the burden upon Glendale Federal of holding a stagnant asset upon which it must pay *ad valoreum* real property taxes and other carrying costs, the City has utilized governmental regulation to effectively thwart Glendale Federal's ability to develop such property. In effect, Glendale Federal's property is being held hostage to the City's desire to acquire open space without the payment of compensation.[2]

---

[1] The City has acknowledged that the subject property, which is adjacent to and overlooks Interstate Highway 405, is suitable for residential use.

[2] Glendale Federal's costly and protracted dispute with the City eventually resulted in federal court litigation that eventually culminated in a stipulated judgment that, at least in theory, has resolved the controversy. (In fact, the City, emboldened by recent California judicial decisions virtually eliminating the right of landowners to compensation for the deprivation by regulation of the right to use

(Footnote continued on next page)

Since the details of what happened to Glendale Federal are obviously not in issue in the within appeal, Glendale Federal will summarize as succinctly as possible the various dilatory maneuvers and devices employed by the City to frustrate development of the subject property and retain it as a "scenic resource" for the benefit of the community.

Contemporaneously with, and immediately after, Glendale Federal's acquisition of the subject property, the City enacted a series of restrictive ordinances purportedly to control development of private property, and thereby protect the flora and fauna located thereon. Thereafter, beginning in or about late 1973, the City enacted a series of successive moratoria ordinances which were designed to, and did, suspend all development pending the adoption of a General Plan and zoning ordinances consistent therewith.

Finally, in December of 1974, the City adopted its General Plan, which incorporated, *inter alia,* the following goals and policies:

> (a) "The City of San Juan Capistrano should give the highest priority to acquiring or otherwise preserving large amounts of the present open space within the City. . . ."
>
> (b) "It shall be City policy that not less than 25% of the current total City area shall be preserved and maintained as permanent public and private open space through the institution of a combination of bold controls, acquisitions, and negotiated contracts with property owners."

Under the General Plan, the bulk of Glendale Federal's land was designated as "open space"; and the enabling Land Use Management Code, enacted in September, 1975, deli-

---

(Footnote continued from preceeding page)

property, has failed to carry out its obligations under the judgment.) Be that as it may, however, Glendale Federal has been motivated to present this amicus brief in order to spare other landowners (including many with more limited resources) the expense and vicissitudes which it has suffered in an effort to vindicate the principal that a landowner should not be effectively deprived of its property without payment of just compensation.

neated such land as "GM-Growth Management District", a zone that permitted certain limited uses, such as animal grazing, egg production, parks, and apiaries.[3]

In March, 1977, Glendale Federal brought an action pursuant to the Fifth and Fourteenth Amendments to the Constitution of the United States; Sections 1983 and 1985(3) of Title 42, United States Code; and a pendent claim was included pursuant to Article One, Section 19 of the Constitution of the State of California.[4]

The City moved (1) for a dismissal of the action and (2) for the federal court to abstain from the exercise of its jurisdiction — a motion that had become fashionable for California municipalities in a federal forum. The motions were denied[5] and eventually the action was settled by a judgment entered January, 1979, pursuant to a stipulation of the parties.

The judgment (1) recognizes that Glendale Federal had been delayed in the development and/or sale of its property as the result of the adoption of various ordinances enacted by the City and that it has the presently vested right to subdivide, develop and sell portions of its property; (2) orders the City to, among other things, amend its General Plan and zoning ordinances, and adopt a development plan already approved by the parties so that Glendale Federal, or any assignee, could develop its property over a specified period of time and without

[3] A "growth management ordinance" (Ordinance No. 314), adopted by the City on December 14, 1976, purports to limit development to no more than 400 units per year. By the terms of the ordinance, projects containing twelve or fewer lots or units, and the developers of lots of at least 2½ acres were exempted therefrom. Property owners subject to the ordinance who wished to develop their property are required to compete in accordance with complex point system which purports to evaluate the quality of a particular project.

[4] Civil No. 77-1066-LEW on the docket of the United States District Court for the Central District of California. By reason of its claims, Glendale Federal sought, in effect, declaratory and injunctive relief, and compensatory damages.

[5] As part of its ruling, the Court dismissed Glendale Federal's pendent state claim.

the constraints of the City's growth management ordinance; and (3) specifies that the City was to act so as to permit the issuances of building permits for 138 residential units in the year 1979.

At the present time, the City has not amended its General Plan; has not amended its zoning ordinances; has not adopted the development plan; and has not issued any building permits, all as provided by the judgment of the District Court.[6] Glendale Federal submits that the City has been encouraged by the recent expansive decisions of the California courts, including the decision that is the subject of the within appeal.

III

ARGUMENT

A. AFFIRMANCE OF THE JUDGMENT OF THE CALIFORNIA SUPREME COURT IN THE WITHIN APPEAL WOULD BE DETRIMENTAL TO PROPERTY OWNERS IN THAT (1) THEY WOULD BE DEPRIVED OF A PROMPT AND EFFICACIOUS REMEDY; (2) PRIVATE PROPERTY COULD BE PUT TO PUBLIC USE WITHOUT PAYMENT OF ANY COMPENSATION; AND (3) THE MARKET FOR THEIR REAL PROPERTY WOULD BE VIRTUALLY ELIMINATED

In considering the within appeal, this Court should be cognizant of the practical, "real world" impact an affirmance of the decision of the California Supreme Court would have. As Glendale Federal shall hereinafter demonstrate, such an affirmance would (1) deprive property owners of a prompt and

[6] Although various courses of relief are available to Glendale Federal in the District Court to compel compliance with the judgment, Glendale Federal presently is seeking to obviate the need for further judicial intervention in the matter. The District Court has been apprised of the City's position, and, if necessary, Glendale Federal presently intends to initiate enforcement proceedings.

efficacious remedy; (2) permit private property to be put to public use without payment of any compensation; and (3) virtually eliminate the market for real property subject to such confiscatory regulation.

1. The Remedies Available to an Aggrieved Landowner

Under the ruling below, a property owner is left with but two remedies: mandamus and declaratory relief. In respect to the former, the property owner finds that a legislative enactment subsequent to any denial of the property owner's application for development will sound the death knell for the property owner's mandate proceeding. See *Selby Realty Co. v. City of San Buenaventura,* 10 Cal.3d 110, 125, 109 Cal.Rptr. 799, 514 P.2d 111 (1973).

As for declaratory relief, even if the property owner prevails at trial, no relief would be forthcoming to compensate the property owner for the carrying costs of his real property, including ad valorem property taxes, for the period of time his land was impermissibly regulated.[7] Rather, in light of an adverse judicial declaration, the government entity, while professing to act in good faith, would merely "go back to the drawing board" and (1) commission and undertake new studies; (2) hold new public hearings; (3) make new findings; and (4) eventually enact new legislation. All the while, the

[7] Under California law, if the property owner prevails in a condemnation proceeding, whether commenced by him or the government, he is entitled to an award compensating him for his attorneys' fees. Sections 1036 and 1235.140, California Code of Civil Procedure. By elimination of the remedy of money damages, however, it appears that the property owner, even if he prevails in his mandate or declaratory relief proceeding, will not be entitled to recoup any portion of his attorneys' fees.

property owner is further prevented from using or developing his property, and is left in a quandry as to whether the effect of the new legislation will be of any practical difference.[8]

As long as the governmental entity is under no effective restraint no matter how overreaching the regulation, the remedies being afforded to the property owner result in neither a prompt nor final resolution of the property owner's grievance.

2. Private Property Can For All Practical Purposes Be Taken For And Be Put To Public Use Without Any Payment Of Just Compensation

Under the decision of the California Supreme Court, a property owner *never* receives compensation when an impermissible restriction is determined to exist. There is neither compensation for the past error of the governmental entity, nor is there any payment forthcoming for the period of time necessary to adopt successor legislation that may, or may not, obviate the impermissible restriction and, hopefully, satisfy the property owner's grievance.

If it is the purpose of a governmental entity to prevent development of a parcel of real property so as to keep it in its natural state, it is far more economical for the governmental entity to use regulation — and not its power of eminent domain — to accomplish its purpose: the governmental entity need not pay compensation, and the property remains on the tax rolls with the property owner retaining the dubious distinction of paying the government for the "privilege" of not using his land.

[8] Given the congested calendars of the trial courts (especially in California), the time necessary for appellate review, and the economic resources required for a property owner to pursue litigation, it is clear that a governmental entity would benefit from additional litigation: not only would the property involved in the litigation be subject to the restriction imposed by the governmental entity during the litigation, but continued proceedings may sap the economic resources of the property owner so that he is financially unable to continue to vindicate his rights. Time clearly is on the side of "city hall" — the longer the better if frustration of development is the goal.

3. The Market For Real Property Subject To Confiscatory Regulation Would Virtually Be Eliminated

It is axiomatic that a confiscatory regulation prohibiting the reasonable utilization of real property will have a "chilling effect" upon the marketability of that property. Few people want to buy a lawsuit. This is not to say, however, that there is no market; the diminution of the value of real property subject to confiscatory regulation will necessarily reduce the price that the governmental entity will be required to pay if it later seeks to acquire the property by exercise of its power of eminent domain.

B. AFFIRMANCE OF THE JUDGMENT OF THE CALIFORNIA SUPREME COURT WILL ENGENDER EXCLUSIVITY IN LIVING CONDITIONS AND WORK TO THE DISADVANTAGE OF THE GENERAL PUBLIC

By enacting confiscatory regulations, so as to thwart development without the payment of just compensation, a governmental entity may accomplish the following: (1) it can limit the number of its residents, and thereby put the burden upon neighboring areas to absorb any population increase (and thus avoid its residents paying for the costs of expanded social services); and (2) it can cause the values of improved parcels owned by its existing residents (including the individual regulators themselves) to appreciate at the expense of the regulated parcels. In short, with little or no new development, and the cost of construction continuing to escalate, a governmental entity can, under the decision of the California Supreme Court, attain whatever degree of exclusivity it desires and make itself a haven for a few at the expense of the general public.[9]

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[9] The famed swallows may always be welcomed to return to the City of San Juan Capistrano, but persons in need of housing may not enjoy the same hospitality.

IV
CONCLUSION

The decision of the California Supreme Court effectively abrogates the constitutional guarantee that property shall not be taken without payment of just compensation. It must be reversed.

Respectfully submitted,

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I. BRUCE SPEISER
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APPENDIX A

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February 19, 1980

Glendale Federal Savings
& Loan Association
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3435 Wilshire Blvd.—28th Floor
Los Angeles, CA 90010

Re: *Agins v. City of Tiburon*
United States Supreme Court—No. 79-602

Gentlemen:

This is in response to your request for my consent to your filing a brief *amicus curiae* in the above-captioned case now pending before the United States Supreme Court. On behalf of the attorneys for the Appellants in that case, I hereby give such consent.

Very truly yours,

JOHN P. POLLOCK

for POLLOCK, WILLIAMS &
BERWANGER

JPP:jb

cc: Gideon Kanner, Esq.
Reginald Hearn, Esq.
Robert I. Conn, Esq.

[LOGO]

CITY OF TIBURON

ROBERT I. CONN
City Attorney

GARY T. RAGGHIANTI
Deputy

OFFICE OF THE CITY ATTORNEY
1534 FIFTH AVENUE • SAN RAFAEL, CALIFORNIA 94901 • (415) 453-9433

February 19, 1980

Aaron M. Peck, Esq.
McKenna & Fitting
3435 Wilshire Boulevard, 28th Floor
Los Angeles, CA 90010

RE: *Agins v. City of Tiburon*
U.S. Supreme Court No. 79-602

Dear Mr. Peck:

This is in response to your request for my consent to your filing a brief *amicus curiae* in the above captioned case now pending before the United States Supreme Court, on behalf of Glendale Federal Savings and Loan Association.

On behalf of the attorneys for the Appellees in that case, I hereby give such consent.

Very truly yours,

ROBERT I. CONN

ROBERT I. CONN
Town Attorney

RIC:sb

Supreme Court, U. S.
FILED
FEB 21 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS AND BONNIE G. AGINS,
Appellants,

v.

CITY OF TIBURON,
Appellee.

On Appeal From the Supreme Court of California

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

National Association of Manufacturers
of the United States of America
1776 F Street, N.W.
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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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28 U.S.C. § 1343(3) (1976). 21

42 U.S.C. § 1983 (1976). 21

Or. SB 100 (ch. 80, 1973 Or. Laws). 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS AND BONNIE G. AGINS,
Appellants,

v.

CITY OF TIBURON,
Appellee.

On Appeal From the Supreme Court of California

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

INTEREST OF *AMICUS CURIAE*

With consent of the parties, the National Association of Manufacturers of the United States of America respectfully submits this brief as *amicus curiae* in support of the Appellants.

The National Association of Manufacturers (NAM) is incorporated under the laws of the State of New York as a non-profit voluntary business association

The NAM represents approximately 12,000 members engaged in manufacturing and related businesses, whose employees comprise an estimated 78% of the nation's manufacturing work force. NAM members are engaged in substantial natural resource activities in a variety of areas. These areas include timber, coal, oil and gas, hard rock minerals, water resource development, agriculture, and land development and building. Members are located in all 50 states, in urban, suburban and rural areas.

This case presents to the Court the question of whether it is constitutionally permissible for a state court, without factual inquiry, to hold unqualifiedly that payment of just compensation for the taking of private property for a public use, provided for by the Fifth and Fourteenth Amendments, is never available as a remedy to a property owner who complains of a taking accomplished by means of regulation, effectively depriving him of his property. Further, the question is also before this Court of whether, if such taking could be proved, the only remedy available is judicial invalidation. NAM members are regulated in most aspects of their business operation, and especially face a myriad of regulation when deciding to make use of their property. The past decade has witnessed a "regulatory explosion," and while no single set of regulations may deprive a private property owner of the use of his property, when taken together, regulatory activity may effectively prohibit such use. It is generally accepted that reasonable restrictions may prohibit proposed use of property when the use will present a clear and present danger to public health and safety. A problem arises, however, when regulatory activity is undertaken to preserve the status quo, the "quality of

life," the parochial interests of local citizens—when special interests masquerade as the public interest.

This case not only addresses the remedy issue in urban and suburban settings, it also concerns the remedy for alleged deprivation of private property rights in rural areas, and presents this Court with the issue of whether a landowner is entitled to his day in court with the opportunity to prove that regulations, which on their face appear to be valid, may in fact be invalid when applied to his property. If such an opportunity is not presented, government may "run amok,"[1] with potentially substantial adverse impacts on local, regional or the national economy.

Due to the NAM's diverse membership base, we believe our filing a brief as *amicus curiae* offers a broad view of the significant issues raised in this appeal. NAM members have a huge stake in stewardship of land and rely heavily on the resources it provides. The case before this Court produces the potential for enormous mischief in relation to those interests. Realizing this, NAM submits this brief in support of Appellants.

ARGUMENT

I. The Court's Decision In This Case Will Have A Substantial Impact Beyond Tiburon. The Decision Will Affect The Right To Use Private Property Nationwide.

State and federal courts have increasingly deferred to the presumption of legislative validity given local governments in their land use and environmental regulatory activities. This is particularly true of zoning in urban areas where land is allocated for specific, limited

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[1] Prince George's County v. Blumberg, —— Md. ——, 407 A.2d 1151, 1155 (1979).

uses—such as residential, commercial, or industrial use. The courts have upheld restrictions which appear to achieve a "public purpose" and the exercise of the police power seems "reasonable," and only recently have the courts begun to question the intent and effect of such actions. Despite the controversy and criticism over the effectiveness of zoning and other land use controls in urban areas,[2] certain state legislation now requires regulation in rural areas as well.[3] The potential for deprivation of property rights and misallocation of resources is enormous. What may be approved as a decrease of density in an urban setting from one unit per acre to one unit per five acres, may be used in a rural setting to justify preventing an owner of forest land from economically using four-fifths of his property. Under a range of public welfare considerations, private rural property may be regulated on the basis of urban-oriented decisions, resulting in increased litigation and adverse impact upon local, regional or even the national economy.

As this Court stated in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 412, 414 (1922):

> To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.

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[2] *See* NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY, H.R. Doc. No. 91-34, 91st Cong., 1st Sess. 199 (1968).

[3] For example, in 1973, the Oregon legislature enacted SB 100 (ch. 80, 1973 Or. Laws), which provided for statewide land use planning. This legislation created a Land Conservation and Development Commission (Or. Rev. Stat. § 197.030) which was responsible for the promulgation of planning goals which all cities and counties in the state must observe.

This applies to other extractable natural resources as well.

One of the more threatening aspects of the continued lack of restriction on the extent of police power regulation is that despite certain judicial inroads to "sophisticated judicial review"[4] of such actions, most courts still defer to the legislative determination that the regulatory activity is "in the public interest." As public health and safety regulatory activity is augmented by legislation to protect the public welfare, the "quality of life"—amenities and luxuries rather than necessities—serious questions arise as to how much private landowners should be burdened for a general public benefit. Again, while it may be appropriate to tell the owner of a railroad terminal that his continued use of the terminal as such is a reasonable use,[5] it is quite another thing to tell a rural resource landowner that he may not cut timber or extract mineral resources in certain areas in order to prevent harm to what is vaguely asserted as the public welfare.[6] The unreason-

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[4] N. WILLIAMS, 1 AMERICAN LAND PLANNING LAW: LAND USE AND THE POLICE POWER § 5.05 (1974).

[5] Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).

[6] An example of this is Context Dev. Co. v. Dade County, 374 So. 2d 1143, 1144 (Fla. Dist. Ct. App. 1979), where plaintiff was served with a cease and desist order issued by the Director of the Department of Environmental Resources Management, ordering him to halt "any further 'rock plowing' . . . that could result in altering said land in any way whatsoever." This order was conditioned upon the submission of an environmental impact statement, even though the Director did not have authority under either the statute or county code to require any environmental impact statement from the property owner. *Agins* has already been cited in correspondence from Congressman Anthony C. Beilenson (D-Cal.) to Mr. Calvin S. Hamilton, Director of the Los Angeles

able restriction of such use may actually harm the public welfare, for the public welfare would be benefited by the new jobs created, the products manufactured, the economic growth and corresponding increased tax revenues resulting from the use of the land.

City Planning Commission, as assurance that it is "legally within your power and is not, in fact, subject to inverse condemnation suits" for the Planning Commission to adopt an "interim protection period" policy to prevent development of private property in the Santa Monica Mountains and the adjacent coastline area included within the boundaries of the Santa Monica Mountains National Recreation Area. This "interim" period should last, he stated, "until the Santa Monica Mountains Comprehensive Plan, the Los Angeles County General Plan, and the Malibu/Santa Monica Mountains Area Plan are adopted." This process will take years to complete, and while this is going on, Congressman Beilenson cites *Agins* for the proposition that there is no risk in denying zoning changes, denying minor land subdivision, denying development-oriented permits, opposing extension of public facilities, and tightening regulation of non-permit activity. There are legitimate reasons for a conservation attitude toward the Santa Monica Mountains, but certainly not the comprehensive protectionist approach suggested. "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922) (Brandeis, J., dissenting).

It should be noted that the California Supreme Court in *Agins* justifies the lack of an inverse condemnation cause of action on the basis of public policy. 157 Cal. Rptr. at 372, 376, 377, 379. However, "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone." Pennsylvania Coal Co. v. Mahon, 260 U.S. 412, 413 (1922). *Amicus curiae* argues that *Agins* is such a case, where federal constitutional rights are placed in substantial jeopardy because of a failure of the California Supreme Court to recognize the limits on the implied limitation.

In rural areas, government agencies are applying concepts which were developed for urban areas where the benefits and burdens on landowners are somewhat reciprocal. In urban areas, each owner's use is restricted but the owner benefits in varying degrees from the restrictions on other property owners. For example, the owner of a residential property is protected against having a factory operating nearby, and industry is protected from the adverse impacts of residential encroachment. Also, property owners often benefit from any stability in property values that zoning tends to provide.

Such reciprocity of benefits and burdens is generally lacking in rural situations. A disproportionate burden all too often falls on the rural landowner in relation to any benefit, and he is often outnumbered and vulnerable in the political process which produces land use regulation.[7]

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[7] Chief Judge Breitel of the New York State Court of Appeals addressed this problem directly:

> The ultimate evil of a deprivation of property, or better, a frustration of property rights, under the guise of an exercise of the police power is that it forces the owner to assume the cost of providing a benefit to the public without recoupment. There is no attempt to share the cost of the benefit among those benefited, that is, society at large. Instead, the accident of ownership determines who shall bear the cost initially. Of course, as further consequence, the ultimate economic cost of providing the benefit is hidden from those who in a democratic society are given the power of deciding whether or not they wish to obtain the benefit despite the ultimate economic cost, however initially distributed (Dunham, Legal and Economic Basis for Planning, 58 Col.L.Rev. 650, 665). In other words, the removal from productive use of private property has an ultimate social cost more easily concealed by imposing the cost on the owner alone. When successfully concealed, the public is not likely to have any objection to the "cost-free" benefit.

Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 596-97, 350 N.E.2d 381, 387, 385 N.Y.S.2d 5, 11 (1976).

It is desirable, therefore, that the Court carefully weigh its words, and recognize the impact of this decision on all land use and land use regulation in the United States.

II. The Growth And Complexity Of Regulation And The Use Of Discretionary Review Procedures Require A Factual Inquiry Into The Impact Of Regulatory Activity. This Is Required Because Regulation Which May On Its Face Appear To Reasonably Regulate, In Effect May Deny All Reasonable Use When Applied To The Specific Property At Issue.

The regulation of land use has substantially evolved since the United States Supreme Court first upheld the concept of zoning in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Zoning began as an extension of common law nuisance regulation, initially to protect the homogeneous, single-family suburb from the city. As land use attorney Richard F. Babcock has stated in his now classic work, THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES (1966):

> The United States Supreme Court in 1926 upheld zoning in the landmark case of *Village of Euclid v. Ambler Realty Co.* because that conservative bench regarded the intrusion of industry and apartments into single-family zones as cousin to a public nuisance, similar to the intrusion of a tuberculosis sanitarium which could be kept out under orthodox common law principles. The Court stated, "A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard," and, after describing the noxious consequences of allowing an apartment house in a single-family zone, it concluded, "Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances."

Id. at 41 (footnote omitted, emphasis omitted).[8] Mr. Babcock then goes on to find that:

> Zoning was no more than a rational and comprehensive extension of public nuisance law, with the great advantage (over the common law nuisance) of providing all landowners with knowledge before the fact of what they could and could not do with their land.

Id.

Traditionally, zoning designated the allowable uses of private property. The fact is, however, that zoning no longer tells the landowner what he can and cannot do with his land.[9] Pressures for environmental protection, growth management, aesthetic regulation, etc., have resulted in increasing regulatory efforts which

[8] The problem of the nuisance approach is that it is easier to state than apply, and that it is difficult to quantify degrees of threat to the public health, safety and welfare.

> The nuisance theory of zoning, however, did not provide an adequate theoretical basis for municipal zoning of undeveloped areas. Under the nuisance theory, an absence of existing uses meant that guidelines for zoning were difficult to adopt. Zoning of undeveloped areas also posed a substantial risk of arbitrary or corrupt administration of zoning by creating sizeable land value gains for favored landowners or builders, while imposing losses on others. There was no assurance under the nuisance theory that municipal administrations of zoning in developing areas would take account of wider regional interests in the location of new housing and other facilities.

Nelson, Comment, *A Private Property Right Theory of Zoning*, 11 THE URBAN LAWYER 713, 715-16 (1979).

[9] Delaney & Kominers, *He Who Rests Less, Vests Best: Acquisition of Vested Rights in Land Development*, 23 ST. LOUIS U.L.J. 219 (1979); and Avco Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), where developer had expended over $2 million in site preparation in reliance upon zoning and other approvals, but was denied a building permit because of a new piece of legislation passed prior to the completion of his grading activity.

condition approval based upon a discretionary review process.[10] In many instances, it can truly be said that the landowner does not know from the face of an ordinance what he can or cannot do with his property.[11]

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[10] URBAN LAND INSTITUTE, ULI RESEARCH REPORT #29, THIRTEEN PERSPECTIVES ON REGULATORY SIMPLIFICATION (A. Kolis ed. 1979).

[11] An example of this is Brecciaroli v. Commissioner of Environmental Protection, 168 Conn. 349, 362 A.2d 948 (1975), where plaintiff was denied a permit to conduct a regulated activity on land designated as tidal wetland. In holding that the denial of the application to fill 5.3 acres of wetland did not constitute a taking without compensation, the court stated:

> The record before us discloses only that a specific application for a permit to fill 5.3 acres of wetland was denied by the defendant. The denial of that application merely prohibited one specific use which presumptively was not reasonable when balanced against the public harm it would create. The plaintiff may still be permitted on subsequent application to fill a lesser portion of his wetland to be used in conjunction with the 3.1 acres of the parcel not classified as wetland; he may make application for a permit or permits to conduct other regulated activities on the wetland; and he may make any reasonable unregulated use of his land consistent with the laws of the state and the zoning regulations of the town of Guilford. "Until it appears that the plaintiff has been finally deprived . . . of the reasonable and proper use of the property it cannot be said that there has been an unconstitutional taking of property without just compensation."

168 Conn. at 357-58, 362 A.2d at 952 (citation omitted).

The land use approval process requires a substantial investment of time and money, and because of its complexity requires the advice and assistance of a variety of professionals. When the application is completed, the reviewing body can withhold approval of *that* proposal, because of the discretionary nature of the present-day approval process, and ask the applicant to try again—without telling him what they will approve.

The New York State Court of Appeals, in a footnote, recently recognized this problem:

> One difficulty faced under the act by both the landowner and the Commissioner should be identified. Since the statute contains a catalogue of uses permitted as of right, and also allows the Commissioner to issue permits for other uses, the landowner may not initially know the full spectrum of possible uses to which his evidentiary proof must be addressed. The availability of uses not permitted as of right will depend upon the scope of permits which the Commissioner is willing to grant. While the property owner should not, for this reason, be relieved of his heavy burden of proof, he should be afforded a reasonable opportunity to obtain notice of the uses, if any, for which the Commissioner would issue a permit. The manner in which this notice may be provided will vary with the circumstances of each case, and the hearing court should, in the first instance, be free to fashion an acceptable remedy. In some instances, it may be appropriate, for example, to require the Commissioner to come forward prior to the hearing with some indication of the uses which he would permit. In other cases, where the extent of permitted uses becomes evident at the hearing, it may suffice to grant the landowner a continuance, if otherwise warranted, to allow him an opportunity to address his burden of proof.

Spears v. Berle, 48 N.Y.2d 254, 263 n.4, 422 N.Y.S.2d 636, 640 n.4 (1979). This attitude, however, is the minority view.

During the period of increasing regulation and discretionary review, the state courts, as Professor Norman Williams, Jr. describes it in his five-volume treatise AMERICAN LAND PLANNING LAW: LAND USE AND THE POLICE POWER (1974), §§ 5.01-5.06, have evolved from a first stage of generally recognizing government's power to deal with nuisances and to exclude certain objectionable occupations from whole towns or from residential neighborhoods. The second stage was

Additionally, with the increasing trend of legislatively providing standing to anyone to intervene in the approval process, we see where even a lone boy scout working on an eagle scout project can block a major project for a year and a half, agreeing to drop the fight in exchange for an acre of property worth approximately $50,000, plus $10,000 in cash which was put into a fund to finance environmental causes. B. FRIEDEN, THE ENVIRONMENTAL PROTECTION HUSTLE 25-26 (1979). *See also* Nahas & Eskind, *Developing in a Hostile Environment*, URBAN LAND, Nov. 1978, at 7; and S. ABRAMS, HOW TO WIN THE ZONING GAME (1978).

one of acceptance of zoning which allowed broad restrictions on use without compensation and the arrangement of uses into districts. A third stage, which Williams calls "Faith in Local Autonomy," evidences "a genuine presumption of validity which controls unless a strong case is made to the contrary, the rule that zoning is valid when the case is fairly debatable." *Id.* § 5.04.

Professor Williams also identifies a fourth stage, one that is presently evolving, which he entitles "Sophisticated Judicial Review," and which he calls "a wiser, more sceptical, and more realistic view." *Id.* § 5.05. He finds that:

> The third period was thus a major (and necessary) step forward to enable American communities to capture some control over their own destiny; it was a stage through which the law had to pass. However, the shortcomings of this approach have gradually become all too evident, for it ignored some of the most important aspects of the present land use control system—the built-in bias towards both fiscal zoning and exclusionary zoning, and the frequently low level of competence of local government.

Id. § 5.04. The third stage evidences a lack of suspicion about motives or actual effects. The fourth stage, however, "reflects a sadder and a wiser mood:"

> It is recognized that many restrictions on developers' property rights are needed in the modern world, to prevent development which will really harm neighbors or the environment generally. But it is also recognized that local land use restrictions may also serve a non-legitimate purpose, or indeed sometimes no real purpose at all—that is, they may be exclusionary in intent and/or effect, or merely the product of a quite parochial vision, or sometimes unduly harsh with little compensating public benefit—or merely inept.

Id. § 5.05. In fact, when state courts have actually examined motive and intent, they have found instances where neither was permissible, or where although there was a legitimate purpose to the action, the means to achieve it were unacceptable.

The Appellate Division of the New York State Supreme Court recently declared unconstitutional five-acre residential zoning in a wealthy Long Island village in *Kurzius, Inc. v. Incorporated Village of Upper Brookville,* 67 App. Div. 2d 70, 414 N.Y.S.2d 573 (1979). After an examination of the record the court found that:

> The record demonstrates beyond peradventure of doubt that the leaders of the village, after consulting with some of the large landowners, *decided to use their zoning power to preserve the village as a citadel of privilege.* Thus their zoning power was not being used as a proper exercise of the police power to serve the general welfare, but rather to stop the march of progress and to preserve special benefits for the privileged group of large landowners which consists mainly of present residents of the village.

67 App. Div. at 81, 414 N.Y.S.2d at 580 (emphasis added).[12]

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[12] The Court went on to state in a footnote

> the truism that zoning power, an exercise of the police power to the State, is to be used to protect and preserve the common weal, not the private interest of individual property

This same court, one month later, reviewed the remanded result in a case dealing with the exclusion of multifamily dwellings. *Berenson v. Town of New Castle,* 67 App. Div. 2d 506, 415 N.Y.S.2d 669 (1979). Justice Shapiro, concurring in part and dissenting in part, stated that:

> In a case such as this where the dilatory tactics of the town have prevented the plaintiffs from proceeding with their building project for more

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owners or even of a local community. If an individual property owner or a group of such owners wish to preserve the sparsely inhabited rural nature of their property they are, of course, free to do so by voluntary association for that purpose. They may not, however, under our system of constitutional government which guarantees equal protection of the laws to all persons, invoke the compulsion of State power by the use of a zoning ordinance to achieve that goal at the expense of other property owners and would-be inhabitants of the community.

67 App. Div. at 82n., 414 N.Y.S.2d at 580n., and followed up in the text of the decision with the following observation:

> We are fully aware of the line of authority which declares that upon parties who attack zoning ordinance rests the burden of showing that the regulation assailed is not justified under the police power of the State or by any reasonable interpretation of the facts. We are also aware that in any area of even moderate density, comprehensive and balanced zoning is essential to the health, safety and welfare of the community and that the task of achieving this goal devolves upon the local legislative body, and that its judgment must be allowed to control if the classification is fairly debatable. However, as we have noted, under the undeniable facts in this case, the plaintiffs have met that burden for it is clear that the ordinance before us was adopted to preserve the present by denying the future. No longer may governmental agencies retain the benefits of, or hereafter adopt, discriminatory, exclusionary or selective zoning ordinances which are designed solely to protect the interests of their more affluent residents by turning a blind eye and a deaf ear to the plight of the less fortunate of their own, or their regions' residents.

67 App. Div. at 82-83, 414 N.Y.S.2d at 581 (citations omitted).

> than five years, two strikes should be out. The conduct of the town fathers exhibits a flagrant and intentional and malicious policy of disregard for the law which was clearly intended to impede, if not entirely defeat, the rights of the plaintiffs. . . . Enough is enough.

67 App. Div. 2d at 518, 415 N.Y.S.2d at 681.

And more recently, the Court of Special Appeals of Maryland reviewed a damage award for the wrongful revocation and failure to reissue building, water and sanitary permits. *Prince George's County v. Blumberg,* —— Md. ——, 407 A.2d 1151 (1979). Based upon an extensive record, for which the printed record extract was nearly 1,500 pages, the court found that "This is a case of government running amok," —— Md. at ——, 407 A.2d at 1155, where the permits were unlawfully revoked in what the court found "beyond doubt" was "bowing to community pressure." —— Md. at ——, 407 A.2d at 1159. Describing the facts as a "Kafkaesque drama," the court affirmed the local government liability for damages. —— Md. at ——, 407 A.2d at 1162.

The cases above are examples of the result of a plaintiff being given his day in court to prove the impact of regulatory activity upon his property. The California Supreme Court, in its opinion below, quotes from this Court in *Pennsylvania Coal Co. v. Mahon,* stating:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power.

157 Cal. Rptr. at 378, *citing Pennsylvania Coal Co. v. Mahon,* 260 U.S. 412, 413 (1922).

The Court, however, in *Pennsylvania Coal Co.* continued:

> But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. *So the question depends upon the particular facts.* The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.

260 U.S. at 413 (emphasis added).

An ordinance on its face allowing a reasonable use of property may still be shown to be invalid as measured against the arbitrary and capricious standard or the Equal Protection Clause of the federal Constitution.[13] Additionally, with the extent of overlapping regulation affecting the basic zoning approval, an examination of the "particular facts" as mentioned in *Pennsylvania Coal* is necessary to determine the validity of the zoning ordinance's impact. Further, remembering this Court's final footnote in its opinion in *Penn Central Transportation Co. v. New York City,* 438 U.S.

[13] The case law in this area concerns itself with exclusionary zoning. *See* D. GODSCHALK, ET AL., CONSTITUTIONAL ISSUES OF GROWTH MANAGEMENT (1979), chapters 3, 6; and AMERICAN BAR ASSOCIATION ADVISORY COMMISSION ON HOUSING AND URBAN GROWTH, HOUSING FOR ALL UNDER LAW: NEW DIRECTIONS IN HOUSING, LAND USE AND PLANNING LAW (R. Fishman ed. 1978), chapter 3.

104, 138 n.36 (1978), Appellants should be provided the opportunity to prove the alleged taking of their private property.[14]

III. The State Citizenship Of A Private Property Owner Should Not Affect His Federal Constitutionally Protected Property Rights.

Supremacy principles should prevent state court decisions from being used to defeat a private property owner's federal Constitutional rights. Appellants' Jurisdictional Statement traces the confusing state of the case law dealing with challenges to allegedly excessive land use regulation.[15] A decision is needed by this Court to provide the requisite guidance necessary to prevent

[14] That footnote stated:

> We emphasize that our holding today is on the present record, which in turn is based on Penn Central's present ability to use the Terminal for its intended purposes and in a gainful fashion. The city conceded at oral argument that if appellants can demonstrate at some point in the future that circumstances have so changed that the Terminal ceases to be "economically viable," appellants may obtain relief.

And as this Court has stated in Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928): "The government power to interfere by zoning regulation with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restrictions cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare."

The principal question Professor Williams finds facing American land use controls today is at the heart of this case—"will judicial review be perceptive and probing, to vindicate basic values, or merely superficial and mechanical?" N. WILLIAMS, 1 AMERICAN LAND PLANNING LAW: LAND USE AND THE POLICE POWER § 5.06 (1974).

[15] Jurisdictional Statement 19-21, Agins v. City of Tiburon, No. 79-602 (U.S., filed Oct. 1979).

the accident of state citizenship from affecting federal Constitutional rights.[16]

It might be considered appropriate to author an opinion on as narrow a legal principle as possible to dispose of the instant case; however, in the spirit of this Court's opinion in *Pennsylvania Coal,* because of the "extensive interests" involved with this case:

> It seems, therefore, to be our duty to go farther in the statement of our opinion, in order that it may be known at once, and that further suits should not be brought in vain.

260 U.S. at 414.

In his review of over 10,000 land use cases, Professor Williams includes in his treatise a section on "Trends in Supreme Court Law, and Their Impact Upon the States." He finds that:

> The principal theme in American planning law for the last thirty years has been the gradual spread among the state courts of the implications of the constitutional revolution of 1937, as promulgated by the United States Supreme Court—or, to put the same point differently, a judicially supervised shift of power away from developers. Speaking very generally, before 1937 public limitations on various kinds of economic activity were generally regarded as dubious and were frequently held invalid by the Supreme Court, while restrictions on various civil liberties tended to be upheld.

[16] The latest statement that this Court, "quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons" will not resolve this problem. Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978).

> Since 1937, the situation has been almost precisely reversed. Public limitations on economic activity have been held invalid only in one or two special situations; in contrast, claims based upon civil liberties have been treated with greater respect and have tended to prevail, although the emphasis has varied at different periods. For the last 20 years, then, the prevailing rule in civil liberties cases has been that there has been more or less an inverse presumption of constitutionality, at least in connection with claims based upon due process. That is to say, activities classified under the "civil liberties" heading occupy a preferred position, and restrictions on such activities can only be justified by a particularly strong showing by the government.
>
> In the years since 1937, this dual attitude has spread slowly through the state courts, with wide variations as between different states. In planning law the first part of the new attitude, giving greater respect to public regulation of economic activity, was generally accepted in most states by the late 1950's; this is the third stage of American zoning, described in § 5.04. As for the second half —the special emphasis on civil liberties—the state courts have been slow to recognize its relevance to the field of land use law; this is finally coming to the fore in the 1970's.

N. WILLIAMS, 1 AMERICAN LAND PLANNING LAW: LAND USE AND THE POLICE POWER § 4.02 (1974) (footnotes omitted).

Professor Williams further finds that this Court has not participated in the development of land use law, and that:

> As a result of this abdication of responsibility by the Supreme Court, the Court—subsequent to its 1937 change of basic attitudes—has had no influ-

> ence in this field whatsoever. This field of law has therefore undergone a basically different experience from most other fields of American public law, for there has been no direct infusion of the basic attitudes of either "the Roosevelt Court" or the "Warren Court"—with their sense of legal realism, respect for social values, and clear articulation of constitutional doctrine. This part of the law has suffered heavily thereby.

Id. § 4.03.

Amicus curiae NAM members have felt the impact of this lack of guidance. Many NAM members do business in more than one state and find themselves subject to differing Constitutional interpretations of the extent to which they can use their private property. Experiences by certain NAM members have left them wondering why it appears that Freedom of Speech and Freedom of the Press are subject to greater protection than private property rights.[17] Some have even wondered why it appears that the due process rights afforded a criminal defendant appear so much greater than those afforded a private property owner attempting to use his property.[18]

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[17] In fact, this Court has accepted the appeal of Pruneyard Shopping Center v. Robins, No. 79-289 (U.S., Jurisdictional Statement filed Aug. 1979), a case from the California Supreme Court in which the court protected the right of private citizens to exercise their right of free speech and petitioning in a privately owned shopping center. The court there found that this Court's decision in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), does not prevent California's providing greater protection than the First Amendment provides, despite the private property owners' objections.

[18] This Court has examined the rights afforded the lessee of private property when facing criminal prosecution for failure to allow a warrantless inspection by a housing inspector. "It is surely anomalous to say that the individual and his private property

The law in this area has "suffered" [19] long enough. Direction by this Court is needed to provide basic guidance to the states' judiciary in handling challenges to land use regulations.

CONCLUSION

This Court has addressed *amicus curiae's* concern in *Pennsylvania Coal Company v. Mahon*:

> When this seemingly absolute protection [of private property rights] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualifications more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

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are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." Camara v. Municipal Court of San Francisco, 387 U.S. 523, 530 (1967) (footnote omitted). *Amicus curiae* feels that the same standard should apply to the Fifth Amendment.

Also, this Court, in Lynch v. Household Finance Corp., 405 U.S. 538 (1972), held that there was no distinction between personal liberties and proprietary rights with respect to jurisdiction under 28 U.S.C. § 1343(3), there being no basis to distinguish between personal and property rights. Then in Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979), this Court found a cause of action properly invoked under 42 U.S.C. § 1983 for the alleged violation of Fifth and Fourteenth Amendment rights because of the impact of a land-use ordinance on their private property. These cases provide hope for private property owners who are being forced to seek a federal judicial forum to escape from the holdings of cases such as *Agins*. *See* Schnidman, *The "Taking" Issue: Reality or Myth?*, URBAN LAND, March 1979, at 14. Guidance from this Court will serve to lessen the need for aggrieved private property owners to seek a federal forum for a hearing on alleged violation of their federal Constitutional rights.

[19] N. WILLIAMS, *supra* note 4, at § 4.03.

260 U.S. at 415. In the half century since the decision in *Euclid* it has been left to the state courts to put flesh on the frame of that decision which permitted restrictions on the Constitutionally-protected rights in private property in return for public benefits. Certain state courts, however, have not heeded the admonition of this Court in *Pennsylvania Coal* concerning human nature.

First, *amicus curiae* points out that the decision of this Court will be viewed nationwide as the "latest word" on the ability of government to regulate private property under the rubric of public health, safety and welfare. Private property owners, government officials and citizens' groups will be quick to interpret the decision as it affects their ability to act. Clear guidance is needed from this Court, and *amicus curiae* respectfully asks this Court to consider the effect of its action on all private property owners, not just those seeking residential use of their property in an urban setting.[20]

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[20] Zoning for urban areas has been recognized as substantially different than zoning for rural areas.

> Under zoning, the owner of undeveloped land surrenders many of his development rights to the municipality. In theory, he is compensated by the fact that public planning will produce a more livable and desirable community environment, one in which property values generally will be higher. In practice, however, this benefit seldom has been realized because of the ineffectiveness of public planning. Instead, the authority to zone undeveloped areas has been widely employed by the majority of municipal residents to satisfy their own purposes, often in conflict with the objectives of minority landowners in undeveloped parts of the municipality. Contrary to planning theory, the administration of zoning has been largely politically determined and has reflected the balance of interests in the municipality at a given time.

Second, *amicus curiae* points out that the state courts, left to expand upon the principles of *Euclid,* have put flesh on the frame of that decision; yet when looking at what has grown from state courts' decisions, widely divergent bodies of law are seen. The attempt to balance an extension of police power regulatory authority over use of land with the rights of the owners of private property has left the case law in utter confusion, and guidance is desperately needed from this Court.

Finally, *amicus curiae* points out that the judicial struggle with new concepts and a variety of techniques has not been without false starts, criticism and confusion. Additionally, the municipal struggle in this area has not been without its problems, political pressures

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Nelson, *supra* note 8, at 721. An example of this is Haas & Co. v. City of San Francisco, 805 F.2d 1117 (9th Cir. 1979), where the court held a rezoning of a developer's property which resulted in a diminution of value from $2 million to $100,000 to be within the police power of the city.

Yet, as commentators have also recognized,

> Zoning in undeveloped areas raises different issues than it does in existing neighborhoods and a different reform approach therefore is required. The introduction of zoning to undeveloped areas initially raised legitimate questions with regard to whether a taking had occurred in that landowners were forced to surrender valuable property rights without receiving any benefits in compensation. At this time, however, it would be impossible in many cases to remedy past inequities, since the land will frequently have changed hands. Instead, the main motive for reform is greater efficiency in land use to stop the major waste of land caused by zoning restrictions that effectively prevent large areas from being used in their most valuable way, or even from being used at all.

Nelson, *supra* note 8, at 726.

and conflicts.[21] The federal Constitutional issue here is important, and should not be glossed over on the basis of facial examination of a restrictive ordinance. As Justice Hall stated in his dissent in *Vickers v. Township Committee of Gloucester Township*, 37 N.J. 232, 181 A.2d 129 (1962):

> Municipal legislative action is always assumed to have been taken conscientiously, sincerely and honestly. The test of validity is certainly something much more than bad faith or corruption. Local officials, no matter how conscientious and sincere in their own minds, may be legally wrong in formulating into legislation what they think is best for their community. *The only place that question can be tested and individual rights and privileges safeguarded is in the courts.* The judicial branch does not meet its full responsibility when, as here, its concept of review gives unquestioning deference to the views of local officials.

37 N.J. at 261, 181 A.2d at 145 (emphasis added). The courts of Oregon have also been concerned with the all too willing attitude of the judiciary to accept local legislative action as appropriate.

> This broad and vague statement of judicial restraint under the separation of powers doctrine, without further definition, furnishes no helpful guide in drawing the line between action which is

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[21] R. BABCOCK, THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES (1966); B. FRIEDEN, THE ENVIRONMENTAL PROTECTION HUSTLE (1979); J. GARDINER & T. LYMAN, DECISIONS FOR SALE: CORRUPTION AND REFORM IN LAND-USE AND BUILDING REGULATION (1978); Babcock, *U.S. to Check Bias in Local Zoning*, The Washington Post, Jan. 18, 1980, at A2, col. 3.

> arbitrary and action which is reasonable. It has been observed that the failure of the courts to identify more definitively the standards relevant in judging the legitimate scope of legislative action in zoning has often resulted in an abdication of the function of judicial review in this field.

Roseta v. County of Washington, 254 Or. 161, 164-65, 458 P.2d 405, 407 (1969) (footnote omitted).

The evolution of land use regulation presents a present-day situation where owners of private property, regardless of what the ordinance regulating their property may state, may not be allowed a reasonable use of their property because of increasing concerns for not only protecting the public health and safety, but also in protecting and enhancing the public welfare. Surely, an owner of private property regulated to the extent that he may not be able to make a reasonable use of it should have his day in court to prove such.

Amicus curiae respectfully submits that the decision of the Supreme Court of California is in error in denying Appellants their day in court,[22] and accordingly ask this Court to find in favor of the Appellants.

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[22] The United States District Court for the Northern District of California would seem to agree with *amicus curiae:*

> Defendants urge the Court to hold that zoning regulations enacted pursuant to a comprehensive plan for community development are proper exercises of the police power and therefore not actionable as a matter of law. In essence, defendants are requesting the Court to apply in the area of land use regulation the "any reasonable basis" test that the United States Supreme Court has applied in evaluating legislative discretion in the areas of economic and social regulation. This

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> Court is unwilling to so hold. The constitutional test in "takings" cases requires an independent judicial analysis of the facts of the case and not merely a finding that the legislative body acted on substantial evidence or was not unreasonable or arbitrary in enacting the ordinance in question. Of course the Court will give considerable weight to the well-considered planning decisions of state and local legislative bodies, but this is only one of several factors to be considered.

Sanfilippo v. County of Santa Cruz, 415 F. Supp. 1340, 1344 (N.D. Cal. 1976) (citation omitted).

Supreme Court, U. S.
FILED
FEB 21 1980
MICHAEL RODAK, JR., CLERK

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BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS DONALD W. AGINS AND BONNIE G. AGINS

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BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS DONALD W. AGINS AND BONNIE G. AGINS

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 42, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of appellants Donald and Bonnie Agins. PLF has filed a brief with this Court in support of the Jurisdictional Statement. Consent to the filing of this brief and the brief in support of the Jurisdictional Statement has been granted by counsel for both parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

The Agins appeal from the decision of the California Supreme Court which holds that they are not entitled to proceed to trial on the issue of whether compensation is required for a total loss of use of their residential ridgeland property by operation of the City of Tiburon's (City) open space zoning ordinance.

This case comes to the Court some eight years after the City of Tiburon had approved the sale of general obligation bonds for the purpose of purchasing Tiburon ridgeland for "open space" uses, had commenced condemnation proceedings to specifically acquire appellants' residential ridgeland property for open space preservation, and then abandoned that proceeding. It comes to the Court only after the City adopted zoning modifications applicable to appellants' property to achieve the open space uses the City apparently, at one time, believed could only be accomplished by exercise of the power of eminent domain. *Agins v. City of Tiburon*, 24 Cal. 3d 266, 270-71 (1979), Appendix A at 2-4.[1] In this context the California Supreme Court rendered its decision.

The decision of the California Supreme Court appealed from holds that California property owners faced with oppressive and invalid land use regulation may not seek money damages by way of the inverse condemnation remedy, but may only seek invalidation of the offending regulation. *Agins*, 24 Cal. 3d at 276-77, Appendix A at 10-13.

Amicus finds the state court's elimination of the money damages remedy anomalous in light of this Court's pro-

[1]All references to the Appendix herein refer to the Appendix to the Jurisdictional Statement.

nouncement in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 123-24 (1978), that it has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." This Court pointed out that it has examined the "taking" question by engaging in essentially ad hoc factual inquiries. *See also Kaiser Aetna v. United States*, ... U.S. ....., 48 U.S.L.W. 4045, 4048 (Dec. 4, 1979). The California Court has rejected this approach and denied appellants all opportunity to present facts to the trial court proving that a taking had occurred requiring compensation.

PLF believes that the *Agins* decision portends grave consequences to the general public in that the California court's decision would carve out a significant exception from the protections of the Fifth Amendment. The decision is based on the extremely disturbing and untenable notion that the protections afforded by the Fifth Amendment's Just Compensation Clause may ebb and flow in accordance with governmental or societal preference. Equally grave are the consequences of the decision to those in search of adequate and affordable housing. The same public policy concerns which lead the California Court to immunize municipalities from the financial consequences of their decision making will permit and even encourage the adoption of unnecessarily restrictive land use ordinances which will further diminish the opportunity to obtain adequate and affordable housing. PLF, by its participation herein, seeks to avoid not only the evisceration of basic constitu-

tional protections, but also seeks to avoid the adverse societal consequences which would flow from the California Court's decision.

PLF is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for PLF is established by an independent Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The PLF Board has authorized the filing of this brief.

SUMMARY OF ARGUMENT

1. The decision of the California Supreme Court poses a serious threat to the integrity of the individual right of property. It is the position of amicus that the burden of promoting the public good should not be borne, even if only for an interim period (*i.e.*, the period when the offending regulation is effective), by a single landowner. To impose such burden would defeat the distributional policy of the Just Compensation Clause. The Fifth Amendment guarantee that private property shall not be taken for a public use without first paying just compensation is grounded in the belief that government should not be allowed to force some people to bear the costs of achieving some public good which should be borne by the public as a whole. *See Armstrong v. United States,* 364 U.S. 40, 49 (1960). As this Court stated in *United States v. Fuller,* 409 U.S. 488, 490 (1973), "The constitutional requirement of just compensation derives as much content

from the basic equitable principles of fairness [citations omitted], as it does from technical concepts of property law." To require the individual landowner to bear the burdens associated with promoting public goals such as open space preservation or preservation of scenic vistas along the California coast would violate the principles of fairness upon which the Just Compensation Clause is based.[2]

Amicus does not herein argue the question of what degree of regulation effects an unconstitutional taking. The concern is with preservation of a property right once infringement of the right has been determined in court. A means for real protection of property rights must be available. The right of property must be guarded as is every other right within the penumbra afforded constitutional protection. *See Griswold v. Connecticut,* 381 U.S. 479, 483-84 (1965). "That rights in property are basic civil rights has long been recognized." *Lynch v. Household Finance Corp.,* 405 U.S. 538, 552 (1972). The remedy of invalidation is not sufficient by itself to safeguard constitutional guarantees contained in the Fifth Amendment and to effectuate the distributional policy of the Just Compensation Clause. Elimination of the damages remedy strikes at the very heart of the institution of private property. Justice William P. Clark cogently summed up the result in his dissent:

> "Today's decision effectively pronounces that henceforth in California title in real property will no longer be held in fee simple but rather in trust for whatever purposes and uses a governmental agency exercising

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[2] *See* Stoebuck, *A General Theory of Eminent Domain,* 47 Wash. L. Rev. 553 (1972); Baumgardner, *Takings Under the Police Power—The Development of Inverse Condemnation as a Method of Challenging Zoning Ordinances,* 30 Sw. L.J. 723 (1976).

legislative powers elects without compensation." *Agins*, 24 Cal. 3d at 282 (Clark, J., dissenting), Appendix A at 21.

2. Amicus takes the position that a California owner whose property becomes subject to unconstitutional regulation cannot effectively protect his rights if he is limited to the remedy prescribed by the California Supreme Court. PLF contends that where a zoning ordinance effects a "taking" of property within the meaning of the Just Compensation Clause of the Fifth Amendment, invalidation of the ordinance does not vindicate or protect the rights of the property owner. In effect, the aggrieved landowner is left with a "nonremedy."[3] This is especially true when the enormous costs of litigation are considered together with the impossibility of monetary recovery and the likelihood that, if ultimately invalidated, slight revision of the offending regulation may require repeated litigation. Under such conditions, the remedy, for all practical purposes, is available only to the very wealthy landowner. PLF believes that a full measure of protection thus is afforded only

[3]As regards the value of the invalidation remedy, Justice William P. Clark stated in his dissenting opinion in *Agins:*

> "[T]he majority's solution is really a nonremedy for an aggrieved landowner. If he can protect his lands only through a proceeding to declare the invalidity of a land use regulation, he must lose interim use of his land—most likely for a period of years—suffering substantial legal costs, even though he may ultimately prevail. Moreover, there is nothing to prevent the governmental agency from reenacting a modified ordinance compelling a second or even third proceeding—a burden exceeding bare possibility in view of the majority's invitation to oppressive land use limitation. Many landowners—particularly small ones—will be economically unable to challenge even a confiscatory enactment, being compelled to walk away from their properties." *Agins v. City of Tiburon*, 24 Cal. 3d 266, 283 (1979) (Clark, J., dissenting), Appendix A at 23.

where the inverse condemnation remedy is available. Invalidation frequently has the effect of perpetuating the injury, while damages in inverse condemnation fulfill the guarantee of just compensation.

3. The policy concerns expressed in the decision of the California Supreme Court assume that there is a higher importance in achieving varying public goals than in maintaining the integrity of basic constitutional guarantees. The perceived threat of fiscal harm to municipalities and chilling impact on the land use planning process cannot justify the evisceration of constitutional rights.

4. The vast majority of the nation's housing consumers will be adversely affected by the *Agins* decision. By holding invalidation to be the sole remedy to correct unconstitutional land use regulation the California Court would absolve communities from the consequences of their decision making and thereby add to the risk and delay incident to housing production. The decision will not only result in less housing at increased cost, but will also make entry into the housing market an experience reserved for an exclusive few.

OPINION BELOW

The opinion of the California Supreme Court is reported at 24 Cal. 3d 266, 157 Cal. Rptr. 372, 598 P.2d 25 (1979). A copy of the opinion is attached as Appendix A to the Jurisdictional Statement.

STATEMENT OF THE CASE

Amicus curiae adopts the statement of the case as it appears in the brief for appellants.

ARGUMENT

I

THE FEDERAL CONSTITUTION THROUGH THE JUST COMPENSATION CLAUSE GUARANTEES THE AVAILABILITY OF THE MONEY DAMAGES REMEDY TO PROTECT INDIVIDUAL RIGHTS IN PROPERTY

A. Protection of Property Rights Against Government Intrusion Is a Fundamental Precept of the Federal Constitution

The real issue in this case is "the extent to which a court will permit . . . governmental intrusion into a constitutionally protected area." *Agins*, 24 Cal. 3d at 281 (Clark, J., dissenting), Appendix A at 20.

For nearly two centuries, American political scientists and legal scholars have pointed to protection of individual property rights as the fundamental motivation for adoption of the Federal Constitution. In keeping with the drafters' intentions, express constitutional restrictions on governmental interference with private property have been augmented by court-made doctrine. Nineteenth century jurists broadly construed the Contract Clause, U.S. Const., Art. I, § 10, as a means of protecting vested property rights against unjust state interference. *E.g., Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). Later, this Court turned to the Due Process Clause of the Fifth Amendment as a restriction on economic legislation. *Mugler v. Kansas*, 123 U.S. 623 (1887). This Court has unambiguously indicated that the Fifth Amendment

guarantee that private property shall not be taken for public use without just compensation operates as a limitation on the exercise of the police power. *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). As stated by Justice Holmes:

> "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 415.

Despite the safeguards created by this Court, states and political subdivisions have, during the past 50 years, made disturbing inroads on the institution of private property. Through a multitude of regulatory programs, individual rights in property have been compromised and sometimes totally disregarded. Without question, individual rights in property are held subject to society's right to be assured of public health, safety, and welfare. With the growth of cities and concomitant increase in urban density, public versus private conflicts were inevitable. The notion of which subjects are appropriate for regulation has necessarily expanded. As this Court stated in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926), "In a changing world it is impossible that it should be otherwise."

Although an owner's freedom to use, enjoy, and derive profit from property has been severely diminished, the individual whose property interests have been subject to regulation which goes "too far" has not been without an effective remedy. In the land use regulatory context, the remedy of money damages is required by the Fifth Amendment. By this constitutional provision, the landowner is

guaranteed just compensation when his property is taken. Without question land use regulation can effect a "taking." *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, ... U.S. ....., 59 L. Ed. 2d 401 (1979). In the event that it does, logical application of the constitutional guarantee requires either that the "taking" be eliminated or that just compensation be provided. Invalidation of an offending regulation neither removes the "taking" (*see* Argument II, *infra*), nor provides compensation. Inverse condemnation on the other hand provides the required just compensation. Therefore, unless an offending regulation can be challenged by inverse condemnation, a landowner has no means of enforcing his constitutionally guaranteed rights. Without the remedy, the Just Compensation Clause would be meaningless in the land use regulatory context. This compels the conclusion that the availability of inverse condemnation to challenge a land use regulation is affirmatively required by the clause. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978); *Gordon v. City of Warren*, 579 F.2d 386 (6th Cir. 1978); *Dahl v. City of Palo Alto*, 372 F. Supp. 647 (N.D. Cal. 1974); *Richmond Elks Hall Association v. Richmond Redevelopment Agency*, 561 F.2d 1327, 1330-32 (9th Cir. 1977).

B. No Valid Distinction Can Be Drawn Between the Power of Eminent Domain and the Police Power Which Can Justify Limiting the Availability of the Money Damages Remedy

The California Supreme Court holds, in essence, that compensation need only be paid where the power of eminent

domain has been exercised or an actual property interest has been appropriated through physical invasion. According to the *Agins* majority, no similar requirement arises from the exercise of the police power. *Agins*, 24 Cal. 3d at 272-73, Appendix A at 5-7. The attempt to identify distinctions between the two powers, and based upon those distinctions, determine the availability of the money damages remedy, has been thoroughly analyzed by legal scholars.[4] The conclusion, however, that utilization of one power or the other is determinative of the availability of the inverse condemnation remedy has clearly fallen into disfavor. The attempted distinction has been variously described as "illusory,"[5] "word play,"[6] or "largely characterized by confusing and incompatible results, often explained in conclusionary terminology, circular reasoning, and empty rhetoric."[7]

It appears to be based upon an identification of two separate and distinct powers: one to acquire and one to regulate. However, the distinction is not supported by sound judicial reasoning or public policy considerations where the ultimate result of the governmental action has been to effect a taking of private property for public use without the payment of compensation.

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[4]Berger, *To Regulate, Or Not to Regulate—Is That the Question? Reflections on the Supposed Dilemma Between Environmental Protection and Private Property Rights*, 8 Loy. L.A.L. Rev. 253 (1975); Waite, *Governmental Power and Private Property*, 16 Cath. U.L. Rev. 283 (1967); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1181 (1967); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. Cal. L. Rev. 1 (1970).

[5]Waite, *supra* note 4 at 291.

[6]Michelman, *supra* note 4 at 1186.

[7]Van Alstyne, *supra* note 4 at 2.

It is plain that "the police power is but another name for the power of government." 1 *Nichols on Eminent Domain,* § 1.42[7] at 1-153 (3d rev. ed. 1979); *accord, Nebbia v. New York,* 291 U.S. 502, 524 (1934). Inasmuch as the various protections afforded by the Fifth Amendment operate as limitations on the power of government, they similarly operate to limit the police power. *Goldblatt v. Hempstead,* 369 U.S. at 590.

This hollow dichotomy has been specifically addressed by the courts within the zoning context. Thus, while the court in *San Antonio River Authority v. Garrett Brothers,* 528 S.W.2d 266, 273 (Tex. 1975), acknowledged the validity of the dictum by Justice Holmes that " 'government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in general law,' "[8] the court also acknowledged that it "must not lose sight of the fact that by express constitutional provision government must pay in certain cases."

With regard to the traditional police power—eminent domain dichotomy, which lies at the root of the notion that compensation is not required for losses occasioned by the proper exercise of the police power, the *San Antonio* court stated:

> "The attempted distinction is, at best, illusory. If there is a taking the constitution requires payment, even though the taking be for the purpose of promoting the public health, safety, morals or welfare and, therefore, involves an exercise of the police power. The empty formalism of 'police power' cannot be made the basis for denying compensation and the Texas

[8] *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413 (1922).

> Supreme Court has expressly refused to 'compartmentalize an exercise of sovereignty as either police power or eminent domain for the resolution of problems arising under Article I, Sec. 17, of the Constitution.' " *Id.* at 273 (citations omitted).
>
> "Where there has been a temporary taking or damaging, the landowner is entitled to recover such sum as would compensate for loss of profits and necessary expenditures." *Id.* at 274.

No distinction should be made between the two powers insofar as the parameters of the protection afforded by the Fifth Amendment is concerned. The protection afforded by the Just Compensation Clause of the Fifth Amendment has been variously stated; however, the intent of the provision is clear:

> "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. at 49.

Similarly, this Court has stated in *United States v. Willow River Power Company,* 324 U.S. 499, 502 (1945) that:

> "The Fifth Amendment . . . undertakes to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project."

The distributional policy basic to the Just Compensation Clause is equally applicable where an exercise of the police

power results in private property being devoted to public use. It matters not what labels are attached to the particular action. The governmental action must be measured by its ultimate result, not by its categorization as an exercise of either the eminent domain power or the police power.

The motivating force behind the adoption of open space ordinances is to retain property in its unused, undisturbed, and natural state so that open spaces and scenic vistas may be preserved and used by the public. Such goals are properly achieved through the exercise of the powers of eminent domain since they are calculated, primarily, to benefit the public. Just as there is an entitlement to money damages where the governmental entity realizes a public purpose by exercising the power of eminent domain, so also there is such an entitlement when private rights in property are extinguished by a governmental choice to achieve the same goal pursuant to the police power. No attempt to avoid liability by the fixing of labels can be countenanced and still afford that protection contemplated by the Fifth Amendment. In the recent Ninth Circuit case of *Richmond Elks Hall Association v. Richmond Redevelopment Agency,* 561 F.2d at 1330, the court stated:

> "When a public entity acting in furtherance of a public project directly and substantially interferes with property rights and thereby significantly impairs the value of the property, the result is a taking in the constitutional sense and compensation must be paid."

Moreover, the court expressly rejected the argument that governmental actions pursuant to the police power fail to give rise to liability:

> "Regarding Agency's argument that it acted pursuant to the police power of the State and therefore is not liable for its taking of Elks' property, we observe that the very authority cited by Agency, *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), refutes its contention. *Berman* involved the rights of property owners whose properties were taken by a redevelopment agency pursuant to the exercise of the State's police power. Under such circumstances the Court observed that '[t]he rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking.' *Id.* at 36, 75 S.Ct. at 104. It is clear from *Berman* that a governmental agency acting pursuant to the State's police power must pay just compensation for any taking it effects. Therefore, assuming *arguendo* that Agency in the instant case exercised legitimate police power, it still must pay for its taking of Elks' property." *Id.* at 1332.

See also Gordon v. City of Warren, supra; *Arastra Limited Partnership v. City of Palo Alto,* 401 F. Supp. 962 (N.D. Cal. 1975), *decision vacated by stipulation of parties,* 417 F. Supp. 1125 (1976); *Bydlon v. United States,* 175 F. Supp. 891 (Ct. Cl. 1959).

By its decision in this case, the court limits the use of inverse condemnation to those cases in which government "takes" private property by physical invasion (*i.e.*, by impliedly exercising the power of eminent domain). To draw this distinction between physical taking of property and denial of substantially all use thereof is to reject universally accepted notions of the concept of property. It is ironic that the *Agins* majority cites this Court's clear definition of "property" which appears in *United States v. Gen-*

eral Motors Corp., 323 U.S. 373 (1945). *Agins*, 24 Cal. 3d at 273, Appendix A at 7. As it is used in the Just Compensation Clause of the Fifth Amendment, "property" denotes

> "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . . In other words, it deals with . . . the individuals' 'interest' in the thing in question. That interest may comprise the group of rights for which the shorthand term is 'a fee simple,' or it may be a [lesser interest]. . . . *The constitutional provision is addressed to every sort of interest the citizen may possess.*" *United States v. General Motors Corp.*, 323 U.S. at 377-78 (emphasis added).

Moreover, it has been expressly acknowledged that deprivation of an owner's right of user can constitute a taking.

> "The modern prevailing view is that any substantial interference with private property which destroys or lessens its value (or by which the owner's right to its use or enjoyment is in any substantial degree abridged or destroyed) is, in fact and in law, a 'taking' in the constitutional sense, to the extent of the damages suffered, even though the title and possession of the owner remains undisturbed." *2 Nichols on Eminent Domain*, § 6.13 at 6-65 (3d rev. ed. 1979). *Accord, United States v. General Motors Corp.*, 323 U.S. at 378.

The distinction thus drawn by the California court between physical appropriation and an unlawful appropriation of a right of use as regards the right to money damages is one that has neither been accepted by this Court, nor should be. To do so is to drastically modify fundamental concepts of property and to abrogate constitutional guarantees.

Amicus believes that a citizen is entitled to money damages when the government appropriates his interest in the *use* of his property, even if only for a temporary period, as well as when it takes his interest in *physical possession*. Right of user is one of the most important and fundamental of the bundle of rights associated with the ownership of property.

II

THE REMEDY OF INVALIDATION IS WHOLLY INADEQUATE WHEN CONSIDERED IN THE LIGHT OF PRINCIPLES OF EQUITY AND FAIRNESS

Amicus strongly urges that there is no real relief provided by the invalidation remedy afforded by the California Supreme Court. *Agins*, 24 Cal. 3d at 269-70, Appendix A at 1. It is illusory at best and in practice actually perpetuates the injury imposed by the invalidated ordinance.

A. Invalidation Returns the Problem to the Entity Which Caused It in the First Place

It is fair to presume that the public objective which has been thwarted by invalidation of the ordinance enacted for its achievement remains desirable. Thus, it is likely that a public agency will pursue the objective through enactment of still another ordinance. The landowner who has won "relief" from the first ordinance will be burdened anew, albeit to a greater or lesser extent. There is the possibility that the agency may decide to exercise its power of eminent domain, but as discussed below, that is unlikely.

It is fundamental to our system of government that courts must defer as much as possible to legislative judgments concerning the manner in which public objectives will be achieved. But legislatures have a concomitant duty to avoid unfairness and to assess the constitutionality of their actions independent of what the courts may require. Tribe, *American Constitutional Law*, § 5.1 at 224 (1978). Unfortunately, lawmakers have frequently failed to fulfill these responsibilities in the area of land use regulation. The question of constitutionality is often given to the court without much consideration by the municipality. One commentator cites this as a major flaw in the invalidation remedy. Berger, *supra* note 4; Baumgardner, *supra* note 2 at 737-38.

The *Agins* decreed remedy thus can have devastating practical effects on the property owner. While attempted resolution of the controversy bounces from court to city council and back again (with great, and sometimes prohibitive, legal costs), the landowner is deprived of the fruitful use of his property,[9] In this regard it should be noted that while the court may enjoin enforcement of the unconstitutional ordinance, the municipality may retaliate pursuant to California Government Code § 65858 and enact a moratorium, pending reconsideration of the challenged ordinance, for up to two years. This renders the invalidation remedy all the more ineffectual against arbitrary and capricious action.

[9]It must be considered that in this case it has been approximately seven years since the Agins filed their claim for damages. All the while the Agins have been subject to the challenged zoning ordinance which by express allegation has deprived them of all beneficial use. *Agins*, 24 Cal. 3d at 279 (Clark, J., dissenting), Appendix A at 17.

Where, as here, the public objective is open space preservation, benefits accrue to the public during the course of this process. For this public *use* of his land, the landowner will receive *no* compensation if invalidation is his sole remedy.[10] This is patently violative of the constitutional guarantee of just compensation.

B. Invalidation Does Not Achieve the Cost Distribution Objective of the Just Compensation Clause

The cost distribution objective of the Just Compensation Clause has long been upheld by this Court. *Armstrong v. United States,* 364 U.S. at 49.

In the aftermath of litigation resulting in invalidation, it can be assumed that the objectives embodied in the challenged ordinance will be achieved nonetheless. During that period and the preceding period of the ordinance's legal

[10]In *Eldridge v. City of Palo Alto,* 57 Cal. App. 3d 613 (1976), defendant city initiated severely restrictive measures on plaintiffs' land in 1969 with a development moratorium imposed pending completion of land use studies. The moratorium was extended twice while the city examined "the open-space problems." In 1972, the city announced the allocation of funds for purchase of plaintiffs' land. Shortly thereafter, their land was designated in the general plan for open space, while the city announced it was exploring how to best use the "open-space funds." It then authorized the purchase of some open space lands. Nevertheless, plaintiffs' land was zoned for open space. Opening Brief for Appellant, Donald F. Eldridge, at 32-40. Suit was instituted in 1973 seeking damages in inverse condemnation. Defendants' demurrer to the complaint was sustained by the trial court, but on appeal in 1976, that decision was reversed. The appellate court held that a cause of action in inverse condemnation had been stated. By then, seven years had passed during which plaintiffs' use of their property had been effectively frozen and the public enjoyed the benefits of open space at the expense of the landowners. The *Agins* court subsequently disapproved the *Eldridge* decision. *Agins,* 24 Cal. 3d at 273, Appendix A at 6. All those property owners similarly situated to *Eldridge* are thus without any effective remedy to defend against even the most egregious of municipal conduct.

effectiveness, the impacted landowner is shouldering a burden which should be borne by the community as a whole. This is sacrificing the individual to the community. Even at the moment the court concludes that the landowner is paying more than his fair share and for that reason invalidates the ordinance, the inequity continues. Thus, invalidation does not provide the protection which is the basis for the just compensation guarantee. There is a total failure to distribute the loss.

This is to be contrasted with the remedy of inverse condemnation. Under that remedy, the burden of providing a public benefit or preserving a public resource would not be borne exclusively by the individual property owner. The cost of providing such benefits would be distributed equitably among the ultimate beneficiaries of the regulation, the entire community.

III

THE PUBLIC POLICY CONCERNS OF THE CALIFORNIA COURT CAN NEVER JUSTIFY CIRCUMSCRIPTION OF FEDERALLY GUARANTEED RIGHTS

The *Agins* majority indicated that in reaching its decision it was persuaded by "the need for preserving a degree of freedom in the land-use planning function and the inhibiting financial force which inheres in the inverse condemnation remedy." *Agins,* 24 Cal. 3d at 276-77, Appendix A at 12. Amicus submits that these concerns, even if well founded, cannot be allowed to abrogate federally guaranteed constitutional rights. The concerns, however, are not well founded. Indeed, considerations of effective planning and economic impact counsel in favor of an opposite result.

A. The Perceived Threat of Fiscal Harm Cannot Justify Abrogation of Constitutional Rights

The California court's opinion reflects an overriding concern for the impact on the public fisc and an insensitivity to the impact on the property owner of the court's preferred remedy, invalidation. This attitude underscores an improper approach to adjudication involving the just compensation guarantee. The court may not cause the strength of the Just Compensation Clause of the Federal Constitution to ebb and flow with the changing conditions of government or societal preference. This Court has indicated that the economic impact of regulation on the claimant is of "particular significance" in resolving controversies arising under the Just Compensation Clause. *Penn Central,* 438 U.S. at 124. The California court ignored this significant factor.

Damage awards for regulatory takings might, in some cases, impose financial hardship on municipalities, but that alone cannot justify the denial of constitutional protection to the individual landowner. "If there are such liabilities to government, there must be staggering losses to private owners."[11] The costs of education, welfare, health services, transportation, and other services heavily burden local governments. Provision of open space and allocation of land use in general should not be treated differently. "Interfering with the individual rights of a few property owners will not solve the financial crises of our state and local governments."[12] In this connection, "it

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[11]Hagman, Misczynski, *Windfalls for Wipeouts: Land Value Capture and Compensations* 297 (1978).

[12]Badler, "Municipal Zoning Liability in Damages—A New Cause of Action," 5 Urban Law. 25, 44 (1973).

would appear that any measure which society cannot afford or, putting it another way, is unwilling to finance under conditions of full compensation, society cannot afford at all."[13] As Justice Holmes warned in *Pennsylvania Coal Co. v. Mahon:*

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. at 416.

B. The Availability of an Inverse Condemnation Remedy Will Not Adversely Affect the Planning Process

The California court concluded that an inverse condemnation remedy would detrimentally restrict local planners in the performance of their duties. The creativity of planners would in no way be inhibited by the threat of damage awards based on unconstitutional regulation. It is their function to develop workable means for the achievement of legitimate public objectives. The availability of the inverse condemnation remedy helps to define the parameters of responsible action and guards against violating those limitations established by the Federal Constitution.[14]

The availability of the inverse condemnation remedy would benefit the land use planning process. Unlike invalidation, this remedy preserves the integrity of a comprehensive plan in the event a component zoning ordinance is successfully challenged. When an ordinance is invalidated, the continued viability of the entire planning scheme, of which the ordinance was a part, is called into question. By upsetting a zoning ordinance on the basis of its application to one parcel, the comprehensiveness of a regional plan is destroyed. It is contrary to good common sense to invalidate an otherwise valid and beneficial regulation which imposes hardship on only one (or a few) individual(s) when the hardship can be alleviated through the payment of damages. In fact, it has been suggested that "[t]he criteria for determining whether to allow an award should be whether it would upset an entire regulatory scheme to invalidate the statute." *Comment: An Evaluation of the Rights and Remedies of a New York Landowner for Loses Due to Government Action—With a Proposal for Reform,* 33 Albany L. Rev. 537, 550 (1969).

Amicus submits as regards the imagined detrimental effects which may flow from the availability of the money damages remedy that the Texas Court of Civil Appeals in *San Antonio River Authority v. Garrett Brothers, supra,* has provided a well reasoned response. The court stated:

> "To hold a governmental agency liable . . . will not cause the heavens to fall, nor will it transform government into a giant shackled into inactivity by the fear of potential liability. It will still be free to enact zoning ordinances, building codes, health regulations, traffic laws, etc. In brief, it will still be able to 'govern' without fear of financial disaster. The only result will be that it will not be able to 'rig' the market in its favor. That is, government will merely be discouraged from giving itself, under the guise of governing, an economic advantage over those whom it is pretending to govern." *San Antonio River Authority v. Garrett Brothers,* 526 S.W.2d at 274.

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[13]Michelman, *supra* note 4 at 1181.

[14]See *Baumgardner, supra* note 2 at 736-38; Badler, *supra* note 12 at 53-55.

IV

RESTRICTION OF JUDICIAL REMEDIES IN THE LAND USE CONTEXT WILL DETRIMENTALLY AFFECT THE NATION'S HOUSING CONSUMERS

Government regulation in the 1970's has been responsible for a dramatic increase in the price of housing. Numerous studies have documented the inflationary impact of housing regulation.[14] They point out that government policy and regulation have been significant factors responsible not only for the creation of a housing scarcity, which has forced prices to escalate, but also for pronounced reduction in the number of people who can buy new homes.[15]

The California Legislature has recognized the problems incident to the provision of adequate and affordable housing and to that end has mandated that California communities "make adequate provision for the housing needs of all economic segments of the community." Cal. Gov't Code § 65302(c).

The *Agins* decision thwarts legislatively established housing policy and the interests of those in search of affordable housing by further increasing the risks associated with the production of housing. Where the provision of housing becomes a high risk undertaking, due to the probability, for example, of delay, lengthy litigation to overturn invalid

[14] *See, e.g.*, Urban Land Institute and Gruen, Gruen & Associates, *Effects of Regulation on Housing Costs: Two Case Studies*, Washington, D.C., Urban Land Institute (1977); and Seidel, *Government Regulations and Housing Costs*, Rutgers University Center for Urban Policy Research (1977).

[15] The Urban Land Institute and Gruen, Gruen & Associates' study points out that "stringent development constraints have resulted in heavy competition for scarce housing and price increases of 25-100 percent per year." Urban Land Institute, *supra* note 15 at 1.

regulations or arbitrary and capricious governmental action, that risk factor is ultimately passed on to the consumer. Economist Paul Samuelson expresses the point as follows:

> "If people generally act like risk averters . . . they will prefer smaller steady incomes to erratic incomes even when those average out to a higher figure. Therefore, economic activities that involve much uncertainty and risk . . . will be forced by comparative entry and exit of risk takers to pay, over the long run, a positive profit premium to compensate for aversion to risk. The yield on capital invested in such industries will involve, in addition to pure interest corresponding to safe investments, an extra element corresponding to positive profit."[16]

The added risk factor discourages entry into the market, reducing competition, and results in less housing at higher prices. The *Agins* decision, creating uncertainty and exacerbating market disequilibrium, adds significantly to a critical housing problem. The problem is evidenced by the impassioned cry for rent control ordinances, condominium conversion ordinances, and similar regulations. Furthermore, an ever increasing segment of the public sees the problem in unconscionable housing prices which prevent social and economic mobility through home ownership.

The same policy which allows cities and towns to exclude housing through zoning ordinances without any fear of adverse financial consequences, also permits community decision makers, as a corollary, to exclude any socioeco-

[16] Samuelson, *Economics: An Introductory Analysis* 604 (6th ed. 1964).

nomic segment of society it might find undesirable. Justice William P. Clark, in his dissenting opinion, noted in this regard:

> "The environment which Tiburon seeks to preserve will disproportionately benefit that wealthy landowner, whose home will be surrounded by open space, unobstructed view and unpolluted atmosphere.
>
> . . . .
>
> "Today's decision must further encourage city councils and their zoners to politically preserve entrenched property use. The decision not only shuts Mr. Agins out from our courtroom, but also his successor-owners from sharing a nice but exclusive environment." *Agins,* 24 Cal. 3d at 283-84 (Clark, J., dissenting), Appendix A at 23-24.

This policy can only be characterized as contrary to the public interest.

CONCLUSION

The decision of the California Supreme Court has placed in jeopardy the fundamental constitutional right of property. This is a right of individual liberty. *Lynch v. Household Finance Corp.,* 405 U.S. at 552. The availability of a remedy in inverse condemnation to challenge regulatory action is essential to the protection of that right and the liberties which flow from the exercise of the right. The right to receive just compensation for private property taken for a public use, whether it be open space preservation or another purpose, has long been heralded as an essential protection against governmental abuse and discrimination. *United States v. Gettysburg Electric Railway Co.,* 160 U.S. 668, 680 (1896). It was in *Pennsylvania*

Coal Co. v. Mahon that Justice Holmes observed that the Just Compensation Clause protects against the destruction of private property resulting from the unlimited exercise of the police power. The interests in immunizing communities from financial liability cannot warrant abrogation of that constitutional guarantee.

For the foregoing reasons amicus curiae Pacific Legal Foundation respectfully urges that the decision of the California Supreme Court be reversed.

Respectfully submitted,

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February, 1980

Supreme Court, U. S.
FILED
FEB 21 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS AND BONNIE G. AGINS,
Appellants,

v.

CITY OF TIBURON,
Appellee.

On Appeal From The Supreme Court of California

BRIEF AMICUS CURIAE ON BEHALF OF THE CALIFORNIA FOREST PROTECTIVE ASSOCIATION IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE

The California Forest Protective Association ("CFPA") is a non-profit, membership corporation which represents the owners of more than 4,000,000 acres, or approximately 50 percent, of the privately-owned commercial forest lands in the State of California. Its members are actively engaged in all aspects of forest management and the production of wood products.

This brief is submitted by CFPA pursuant to Rule 42 in support of the appellants. CFPA believes that the decision of the lower court, if allowed to stand, will substantially deprive the owners of private timberlands (and possibly others who operate in intensively regulated industries) of any effective means of redressing excessive government regulations.

STATEMENT OF THE CASE

In *Agins* v. *City of Tiburon,* 24 Cal. 3d 266 (1979), the California Supreme Court ruled that landowners may not claim damages for inverse condemnation of their property based upon the excessive use of the police power by a governmental entity. Donald and Bonnie Agins were the owners of five unimproved acres of land in the City of Tiburon. After aborting proceedings to acquire the property by eminent domain, the City enacted a zoning ordinance which restricted the use of the Agins' property to low density residential housing, open space uses, accessory buildings and related uses. The Agins then commenced suit charging that the ordinance constituted a de facto taking of their property by inverse condemnation for which they sought substantial damages. They also sought to establish the ordinance's unconstitutionality as a taking without payment of just compensation. On appeal of the dismissal of their complaint, the California Supreme Court held that the aggrieved landowners' sole remedy was to seek to

invalidate the excessive regulation. The court then found that the Agins had also failed to state a claim for declaratory relief.

The only justification offered by the court to support its unprecedented ruling in eliminating inverse condemnation damage actions was that such suits represented an unacceptable financial threat to far-reaching and innovative land use planning by governmental entities. It was the majority's view that this type of planning is socially desirable and must therefore be encouraged (albeit at the expense of the owners of private property). Even a cursory review of the opinion confirms that the decision rests not on legal precedent or analysis but rather only on the perceived social policy considerations of six of the seven justices of the California Supreme Court.

ARGUMENT

Invalidation is an Inadequate Remedy to Cure Regulatory Excesses.

The appellants' brief and those of the other amici supporting appellants have ably demonstrated that the California Supreme Court erred in its ruling and that the decision should be reversed. CFPA does not propose, therefore, to address all of the constitutional questions presented in this case. Rather, CFPA will discuss only the question of whether, considered within the context of the regulatory scheme applicable to its industry, invalidation provides an adequate remedy by which timberland owners can obtain relief from excessive regulation. CFPA submits that, for the reasons set forth below, it clearly does not.

The *Agins* case involved a relatively uncomplex regulatory scheme where the landowners were forced to evaluate the impact on their property, and hence the legality, of only *one* governmental action. Having decided that the zoning ordinance constituted a de facto taking of their property, they were

required to initiate only *one* legal challenge against *one* governmental entity in order to attack the ordinance.

In depriving the Agins of the right to obtain damages for inverse condemnation, the California Supreme Court was purportedly leaving them with a remedy by which they could fully vindicate their rights. The court failed, however, to even acknowledge any of the more obvious difficulties that the Agins would encounter with the invalidation remedy—*e.g.*, undue delay and expense, the possible need to launch repeated legal attacks against successive invalid regulations, the inducement to regulatory overzealousness resulting from the removal of financial risk. This failure serves to underscore the inherent weaknesses in the court's reasoning.

These same difficulties that the Agins would face with the invalidation remedy will also be experienced, but on a much more compounded and magnified basis, by other landowners whose land use activities are subject to a maze of intensive regulatory controls administered by a host of regulatory agencies. The timber industry operates in such a regulatory environment.

In California, timber operations are conducted under a complex network of environmental laws, ordinances and rules promulgated and administered by no less than 14 federal, state and local agencies. The principal regulatory agencies and their primary areas of jurisdiction are listed in Schedule I.

An approved timber harvest plan must be obtained from the appropriate governmental authorities before any timber operation may be commenced. As many as 2,400 plans are filed in California annually, each pertaining to proposed harvesting and reforestation operations on small, dispersed timberland areas throughout the State. Each of the various regulatory agencies, exercising concurrent (and often overlapping and conflicting) jurisdiction, imposes its own set of restrictions and prohibitions. Moreover, to address specific conditions encountered in the woods, the regulators are often

vested with substantial discretionary authority to impose additional controls far exceeding those contained in any published rules and regulations. In some cases, this discretionary authority even includes the power to veto the proposed activity.

As the property owner emerges from the plan approval process, he or she is confronted with the task of assessing the impact of a multitude of restrictions and controls on the proposed operation. The timber harvest plan may have been burdened with excessive regulations by one agency or by many. Alternatively, it may be that none of the restrictions, considered independently, are excessive; yet taken together, it may be clear that the landowner has been deprived of all reasonable use of the property.*

To challenge the excessive regulations, the landowner might be forced to pursue his or her case against numerous governmental agencies before multiple tribunals, in either concurrent or successive actions. Even assuming the property owner is willing to pursue these lengthy and costly challenges, the reward for success may be fleeting and illusory. The prospect remains that he or she will be forced to repeatedly challenge the new restrictions that are enacted to replace those just invalidated. Under these circumstances, the invalidation remedy is not simply inadequate; it is no remedy at all.

CFPA believes that the balance between government regulation and the rights of property owners must be restored and maintained. The timber industry needs a stable environment in which to operate and some reasonable assurance that today's investments in forest lands can be realized after the many years it requires to grow the trees to maturity. It would be fiscal madness to continue to make such investments if the landowner, having had his or her property confiscated by

* By virtue of remote location, terrain, lack of access and uses of surrounding properties, timberlands generally are not suited for any other uses other than timber production or dedication to the public as wilderness.

regulation, has no remedy available to recoup his or her losses. CFPA submits that inverse condemnation, and not invalidation, can only provide that remedy.

CONCLUSION

For the foregoing reasons, it is urged that the ruling of the lower court be reversed.

Respectfully submitted,

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SCHEDULE I.

Principal Agencies with Regulatory Jurisdiction over Timber Operations on Private Forest Lands

Agency	General Area of Jurisdiction
Federal	
Environmental Protection Agency	Regulates activities affecting air and water quality standards
Department of Interior	Regulates activities on lands near national parks, national scenic areas, etc.
State of California	
Resources Agency	Regulates activities on Wild and Scenic Rivers; regulates use of herbicides and pesticides
Board of Forestry	Principal rule-making agency for regulating timber operations
Department of Forestry	Principal approval, inspection and enforcement agency for timber operations
State Water Resources Control Board	Principal rule-making agency for implementing federal and state water quality standards
Regional Water Quality Control Boards	Regulates activities affecting water quality
Department of Fish and Game	Principal regulatory agency for activities affecting wildlife, fish and other aquatic resources
Department of Mines and Geology	Regulates activities in geologically significant areas
Department of Parks and Recreation	Regulates activities affecting state park areas and historic, archaeological and Native American sites
California Coastal Zone Conservation Commission	Regulates activities in Coastal Zone
Air Resources Board	Regulates activities affecting air quality; implements federal and state air quality standards
Local	
County Boards of Supervisors	Regulates various activities connected with timber operations such as transportation, noise abatement, etc.
County Agricultural Commissions	Regulates use of herbicides and pesticides

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BRIEF OF NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICUS CURIAE IN SUPPORT OF APPELLE CITY OF TIBURON

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,

Appellants,

v.

CITY OF TIBURON, CALIFORNIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF OF NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICUS CURIAE IN SUPPORT OF APPELLEE CITY OF TIBURON

INTEREST OF THE AMICUS CURIAE

Pursuant to Rule 42 of this Court, the National Institute of Municipal Law Officers (NIMLO) respectfully submits this

brief as amicus curiae in support of appellee, City of Tiburon. NIMLO is an organization composed entirely of municipalities who are political subdivisions of states. Founded in 1935, it now has a membership of over 1500 municipalities located in all 50 states and the District of Columbia. Each member municipality participates through its chief legal officer, usually designated as city attorney, corporation counsel, city counselor, etc., and the chief legal officer's assistants.

As the legal officers of their cities, those who operate NIMLO for their municipalities defend city planning and zoning decisions in actions for declaratory and injunctive relief. The availability of these actions to landowners was not curtailed by the decision below, and NIMLO does not urge any restriction on the availability of these actions. Rather, NIMLO argues that the threat—even in cases as frivolous as the record here reveals this case to be—of an action for damages will inhibit rational and vigorous land use decisionmaking by local government officials and thus damage the public interest.

NIMLO believes that if the opinion of the California Supreme Court below is left standing, it will allow local governments to properly enact land use decisions to guide the physical development of their jurisdictions and to preserve and improve the quality of life for their citizens, and at the same time protect property owners from unconstitutional infringement of their property rights by retaining the right to invalidate excessive legal regulations by declaratory and injunctive actions.

Consent to the filing of this brief has been granted by counsel for both parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

STATEMENT OF THE CASE

The Agins, appellants here, own five acres of land in Marin County, California, which they acquired for the purpose of development. (App. 4). They described the area as "the most desirable place to live in the State of California . . . resulting in the highest land value per acre for suburban areas in the State of California." (*Ibid*).

Appellants claimed (App. 6) that a 1973 ordinance of the City of Tiburon, allowing them to build and sell up to five houses on their land (see J.S. App. 3), was confiscatory and entitled them to $2 million in damages (App. 11, 14). The Agins never have attempted to improve their property (J.S. App. 3). Nor, perforce, have they sought approval for development from the City of Tiburon, "nor have they either sought or received any definitive statement as to how many dwelling units they could build on their land." (J.S. App. 3).

The Agins filed a claim for $2 million in damages against Tiburon in 1973 (J.S. App. 4) and perfected that claim by filing this case in 1975. (*Ibid.*).[1] The gravamen of the Agins' complaint was that the City's ordinance, permitting them to build five houses "had completely destroyed the value of their property." (J.S. App. 4).

The record in this case does not reflect the value of the Agins' land under the Tiburon ordinance. An article on the

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[1]Therefore, the aborted attempt of Tiburon to pursue a condemnation remedy from late 1973 (after the Agins' claim has been filed) until late 1974 (before the Agins' suit had been filed) (J.S.App. 4) is irrelevant both to the disposition of this suit and to the admitted motivation of the Agins in bringing it.

case in a legal newspaper,[2] describes values of $225,000 per acre, for land alone, in Tiburon. At this rate, the ordinance permits the Agins to realize at least $1.12 million on the sale of their property for lots.

The complaint was in two counts: first for damages, second for declaratory relief. The trial court held that the claim for declaratory relief failed to allege facts sufficient to state a cause of action for, *inter alia*, "the unreasonable restriction of the Agins' use and enjoyment of their property." (App. 12). Although the court gave the Agins leave to amend this claim (J.S. App. 5), they have declined to do so. (Br. 8).

The count praying $2 million damages was also dismissed, this without leave to amend. The only issue on appeal is whether the damages claim should survive. The courts below[3] were quite clear, in arranging California's jurisprudence for the future, that declaratory and injunctive relief remain with full vigor in a proper case, to remedy illegal government land use regulation. (J.S. App. 12).

On the record before it, the California Supreme Court held that the Tiburon ordinance did not "deprive the landowner of substantially all reasonable use of his property." (J.S. App. 13). Therefore, the ordinance was lawful, and these appellants were not entitled to any relief, either damages or injunctive or declaratory relief.

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[2]Work, KO'd by Zoning: Who Pays?, National Law Journal (Jan. 28, 1980), p.1.

[3]The California Court of Appeal, in an opinion reproduced in neither the Jurisdictional Statement nor the Appendix to the briefs, affirmed the dismissal of the claim for declaratory relief, but reversed as to the dismissal of the damages claim. 80 Cal.App.3d 225, 145 Cal.Rptr. 470 (1978).

In any event, the Court said, mandamus or declaratory relief would provide sufficient remedy against any illegal government action in this or other cases. (J.S. App. 12). Therefore, the "chilling effect" of an inverse condemnation remedy "upon the exercise of police regulatory powers at a local level" (*Id.* 13) was both unnecessary to the Agins and excessively intrusive of the City of Tiburon's planning and zoning powers.

While appellants' Jurisdictional Statement raises questions related principally to the appropriateness of a damages remedy in the abstract, the Statement does ask this Court to reweigh the facts (J.S. 4, Question 5) after three courts below have done so adversely to the Agins. Moreover, the Agins, having declined to amend their complaint, when permitted to do so, to allege the facts tending to show "the unreasonable restriction of . . . the use and enjoyment of their property" (App. 12), now also urge this Court to order a factual inquiry "whether the regulated property is in fact economically or physically capable of being put to uses ostensibly permitted by the regulation" (J.S. 4, Question 3).

ARGUMENT

Appellants admit that "allegations of takings give rise to issues of fact" (Br. 9; see also *Id.* 13), but urge that it was error for the Court below to conclude "that the taking power is exercised either properly or wrongfully, and . . . that it is only in the former case that 'just compensation' is awarded." (Br. 18). Rather, the appellants recommend the damages claim in this case as a paradigm "incentive[ ] to local governmental entities[ ]" through its prayer that the government "pay" for the "consequences of [its] own informed

decisionmaking." (Br. 40) (mutatis mutandis).

At the threshold, it is not necessary for this Court to decide whether each state court system may—or must—entertain damages suits in inverse condemnation. The finding of three courts below was that the Tiburon ordinance did not effect a "taking" of the Agins' property. This Court normally does not sit to reweigh concurrent findings. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949) (concurrent findings of two courts below). Unless the concurrent findings of three courts below are disturbed here, the availability of an inverse condemnation remedy of damages for government regulation "taking" the value of land, is not fairly presented for decision, since there was no "taking" in this case.

Nonetheless, for the reasons set forth below, Amicus would urge the Court not to disturb the conclusions of the California Supreme Court, even if any opportunity to do so were fairly presented.

I.

THE DEMAND FOR GOOD LAND USE REGULATION SUPPORTS THE ELIMINATION OF INVERSE CONDEMNATION AS A REMEDY.

The decision by the California Supreme Court below to clarify the unavailability of inverse condemnation was based on the belief that this remedy is both inappropriate and undesirable in light of California's need for good land use regulation. In particular, the Court wished, first of all, to preserve flexibility in community planning and, second, to remove the inhibiting effect of an inadvertent expenditure of public funds which would result from the enactment of an

invalid regulation. These same policies are applicable to all local entities exercising land use decisions in the United States.

A. THE THREAT OF SUITS FOR DAMAGES UNDER INVERSE CONDEMNATION WOULD DETER EFFICIENT LAND USE PLANNING.

Municipalities have traditionally been authorized to exercise the police power to promote the public health, safety and general welfare. A municipality must be free to exercise this authority in the form of zoning regulations without incurring monetary liability should exercise of that authority later prove erroneous. Otherwise, necessary public action might not be taken. Comment, "Takings" under the Police Power—The Development of Inverse Condemnation as a Method of Challenging Zoning Ordinances, 30 Sw.L.J. 723 (1976).

Under the rule appellants here suggest, a municipality would be compelled to enforce all ordinances at its own financial peril until their validity was judicially determined. See, e.g., *Ellis* v. *City of West University Place*, 141 Tex. 608, 175 S.W.2d 396 (1943); Hall, Eldridge v. City of Palo Alto: Aberration or New Direction in Land Use Law?, 28 Hastings L.J. 1569, 1597 (1977). Commentators judge this to be an unsound result, since a municipality should not be inhibited in taking needed public action by fear of excessive liability where the limit of the police power is at issue. Cabaniss, Inverse Condemnation in Texas—Exploring the Serbonian Bog, 44 Tex.L.Rev. 1584, 1600 (1966).

The possibility of incurring significant, unanticipated liability in money damages as a result of invalidation of a zoning ordinance in an inverse condemnation action, would

have a chilling effect on governmental experimentation in land use control. This inhibition would most severely affect rapidly growing communities, those that most need innovative land use control, yet are least able to risk incurring such liability. Beuscher, Some Tentative Notes on the Integration of Police Power and Eminent Domain by the Courts: So-Called Inverse or Reverse Condemnation, 1 Urb.L.Ann. 1,12 (1968); Comment, Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance, 26 Stan.L.Rev. 1438, 1450 (1974); Hall, *supra*, at 1597. In a rapidly developing community, it is essential that development be directed before it takes place, as undesirable development can be redirected later only at a much greater cost to landowners. The deleterious consequences of haphazard community growth are recognized by the courts as one reason inverse condemnation should not be available to challenge land use regulations. See, *Selby Realty Co.* v. *City of San Buenaventura*, 10 Cal.3d 110, 120, 514 P.2d 111, 117, 109 Cal.Rptr. 799, 805 (1973).

The police power is an elastic power. Regulations are sustained under the complex conditions of today which, but a short time ago, might have been condemned as arbitrary and unreasonable. *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 386 (1926). See, also, *Berman* v. *Parker*, 348 U.S. 26, 32 (1954).

The California Supreme Court weighed carefully this diversity across time, as well as the geographical diversity among state systems of jurisprudence. For example, the Court considered the likelihood of a voter initiative "inadvertently" triggering an award of damages in inverse condemnation. (J.S.App. 12). Direct citizen lawmaking, through the initiative and in other forms, is more prevalent in California than in other states. The accommodation of the

Court below to this reality should be given deference by this Court, in any case. This is especially so here, where the nationwide rule urged by appellants would not even give them relief, on the record of this case, since there was no "taking" of their land.

B. EXCESSIVE FINANCIAL PRESSURE WOULD BE EXERTED UPON MUNICIPALITIES BY EVEN THE THREAT OF FRIVOLOUS INVERSE CONDEMNATION LITIGATION.

The fears articulated above are present even where the claim of the landowner of the invalidity of the government land use regulation is meritorious, and where the landowner seeks principally relief from the regulation. On the record of this case, neither circumstance is present.

The Court below held that the Tiburon ordinance was valid and did not deprive the Agins of the use of their land.

The trial court below gave the Agins leave to amend that part of their complaint seeking declaratory and injunctive relief, even while dismissing outright the claim for damages. The Agins have not amended, as the Court below found, and as they admit. (Br. 8). They do not seek relief from Tiburon's land use regulation, merely an award of money to accompany its exercise.

The fact which brings the Amicus before the Court is that such a preference for damages, rather than for lawfully corrected government regulation, is common in actions against local governments through the nation.

Real dangers would be involved in a proposal to force municipalities to compensate landowners in inverse condemnation for losses claimed to result from zoning restrictions. If a large area of land is involved in the zoning

regulation, disgruntled landowners could combine and bring so many inverse condemnation suits that a municipality would be financially unable to make the necessary payments. Comment, "Takings" under the Police Power, *supra*, at 738. Furthermore, with such an arrangement in effect, in an area likely to undergo rapid development, this will serve as an open invitation to a few developers to combine in bringing inverse condemnation suits, thus breaking the whole scheme of land use controls in the area. 5 Williams, American Land Planning Law, §159.18, at 386 (1975).

The chilling effect of extending inverse condemnation to zoning actions and paying damages with public funds is very real, as evidenced by the claims brought against many municipalities. Among them are claims in inverse condemnation for approximately $85 million against Fremont, California, based on its general plan, and for over $40 million against Palo Alto, California, for rezoning to less dense uses. Brief of Amici Curiae for the City of Cerritos at 25, *HFH, Ltd.* v. *Superior Court*, 15 Cal.3d 508, 542 P.2d 237, 125 Cal.Rptr. 365 (1965). In fact, in an action brought by just one landowner challenging the Palo Alto downzoning, the complaint sought compensation in the sum of $4 million, plus costs, interest and fees. *Eldridge* v. *City of Palo Alto*, 57 Cal.App.3d 637, 129 Cal.Rptr. 575, 590, n.1 (1976) (noted in dissent of Sims, J.) (disapproved in *Agins* below. (J.S. App. 6)).

In the instant case, the Agins seek $2 million in damages from a small city with a population of only 6,000.

It has also been noted that the greater availability of attorney fees in inverse condemnation actions, as compared to the traditional forms of relief, would further encourage such litigation against municipalities. Work, KO'd by Zoning: Who Pays?, National Law Journal (Jan. 28, 1980),

p.9. Such fears are reinforced by the recent appearance of legal articles aimed at assisting plaintiffs' attorneys in preparing inverse condemnation challenges to zoning restrictions. Kanner, The Consequences of Taking Property by Regulation, 24 Prac.Law. (No.3) 65 (1978).

An action for inverse condemnation damages has the potential—exercised on the record of this case—to serve not as a claim for relief, but as an attempt to extort action or inaction from local government zoning and planning authorities, whether or not such action furthers the general welfare.

By insisting on their claim for damages and abandoning their claim for declaratory (or injunctive) relief, the Agins urge a rule which will defeat rational land use planning. The California Supreme Court below described the analysis and "weighing of costs and benefits" (J.S. App. 11) attending the formulation and implementation of the general land use plan required by state law. (J.S. App. 2). Under that procedure, the Agins had an opportunity to contribute their views— and their facts—to the cost-benefit calculus for the entire region. Under the declaratory and injunctive actions left available to meritorious plaintiffs by the decision below, litigants may seek a judicial evaluation of the calculus, again on a comprehensive basis.

Under inverse condemnation, however, the Agins have sought, not a new plan for Tiburon, but a special arrangement covering themselves alone. Moreover, the special arrangement is not in the nature of a variance or special exception, but consists of compensation solely. The Agins would be quite satisfied if the City never changed its plan and land use ordinance—or the Agins' treatment under them—so long as the City purchases the Agins' land at the Agins' price.

The Agins are candid in their brief to admit a desire to

discourage any government action which will relieve them of the effects of the ordinance of which they complain, and correspondingly diminish their damage claim. (Br. 38).

A municipality should not be threatened through inverse condemnation to make unwise and *ad hoc* zoning changes. Mandelker, Inverse Condemnation: The Constitutional Limits of Public Responsibility, 1966 Wis.L.Rev. 3, 48. Where the municipality has impaired the rights of private property by regulation unattended by physical invasion and unconnected with any public improvement, the landowner may not elect to ratify an unconstitutional action of the municipality and recover damages as for a compensable taking. Cabaniss, *supra*, at 1602. A public policy encouraging the purchase of landowner acceptance of what would traditionally be unauthorized regulation is misconceived. The possibility of compensation inherent in such a policy appears to invite nonparticipation by landowners in the legislative process rather than encourage landowners to follow that process closely to guard against arbitrary exercises of the police power. Hall, *supra*, at 1598; Note, 66 Harv.L.Rev. 1134, 1135 (1953).

If inverse condemnation is available to zoning challengers, that cause of action could be extended to test the validity of any governmental regulation, whether the regulation affected tangible or intangible property. There is no logical reason to limit the availability of the remedy under inverse condemnation to invalid regulations affecting real estate, as excessive regulation of any other property interest could have as great an economic impact on an individual as regulation of real estate. Expanded notions of property, see, e.g., *United States* v. *Finn*, 127 F.Supp. 158, 167 (S.D.Cal. 1954), *modified*, 239 F.2d 679 (9th Cir. 1956); *Sutfin* v. *State*, 261 Cal.App.2d 50, 67 Cal.Rptr. 665, 666 (1968); Comment,

38 Wash.L.Rev. 607 (1973), coupled with the principle that regulations restricting the use of property beyond a certain point become takings, suggest the availability of inverse condemnation actions to challenge the validity of governmental regulation of any property interest.

II.

THE FIFTH AMENDMENT DOES NOT REQUIRE INVERSE CONDEMNATION AS A REMEDY.

The Fifth Amendment is designed to protect the rights of landowners; it does not, however, require inverse condemnation as a remedy to protect those rights. The key, then, to affording to the landowner the protections guaranteed by the Fifth Amendment is not the availability of inverse condemnation, but the availability of adequate remedies. In this case the California Supreme Court specifically reaffirmed the availability of both mandamus and declatory relief as wholly adequate remedies and thus assured that the rights of landowners under the Fifth Amendment will continue to receive protection in the courts of California. This Court, as a matter of sound judicial policy, should accept this view.

California is not alone in recognizing the need for flexible land use planning; New York has experienced some of the same need. In *Fred F. French Investing Co., Inc.* v. *City of New York*, 39 N.Y.2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381, *appeal dismissed*, 429 U.S. 990 (1976), New York's highest court chose invalidation of a zoning amendment, rather than an award of monetary damages, as the appropriate remedy for an invalid regulation not associated with

any physical invasion or dedication of the property for public use.

Invalidation is not illusory as a judicial remedy. California courts, federal courts and courts from other states, in addition to New York, have shown no hesitation in invalidating land use actions taken by public entities where an excessive exercise of the police power or other arbitrary action has been involved. E.g., *State* v. *Superior Court* (*Veta*), 12 Cal.3d 237, 115 Cal.Rptr. 497, 524 P.2d 1281 (1974); *Scrutton* v. *County of Sacramento*, 275 Cal.App.2d 412, 79 Cal.Rptr. 872 (1969); *Union Oil Co. of California* v. *Morton*, 512 F.2d 743 (9th Cir. 1975); *Gaebel* v. *Thornbury Township*, 8 Pa.Commw. 399, 303 A.2d 57 (1973); *Mailman Dev. Corp.* v. *City of Hollywood*, 386 So.2d 614 (Fla. 1974). As the California Supreme Court has held here, judicial invalidation of improper land use regulatory action strikes the proper balance between the needs of public entities to protect the public interest and the rights of private property owners; the remedy of forced purchase through inverse condemnation is not appropriate.

Regardless of the form of an action by a landowner, i.e., whether it be declaratory relief or mandamus, constitutional standards will have to be satisfied in order for the land use regulatory measure to be sustained.

All of these policy considerations are native to all the states of the Union and especially to those which have enacted comprehensive systems of statutes on land use planning, open-space preservation, zoning and related matters. Cities and counties, within the last few years, have enacted several land use ordinances or regulations which have been upheld by the courts to help preserve flood plain zones (*Turnpike Realty Co.* v. *Town of Dedham*, 362

Mass.221, 284 N.E.2d 891, 900 (1972)); wetlands (*Sibson* v. *State*, 115 N.H.124, 336 A.2d 239 (1975)); areas for parks (*Associated Home Bldrs.* v. *City of Walnut Creek*, 4 Cal.3d 633, 94 Cal.Rptr. 630, 484 P.2d 606, *appeal dismissed*, 404 U.S. 878 (1971)); coastlines (*State* v. *Superior Court (Veta), supra*); lakeshore areas (*Just* v. *Marinette County*, 56 Wis.2d 7, 201 N.W.2d 761 (1972)); agricultural uses (*Gisler* v. *County of Madera*, 38 Cal. App.3d 303, 112 Cal.Rptr. 919 (1974)); the San Francisco Bay (*Candlestick Properties, Inc.* v. *San Francisco Bay Conservation Comm'n.*, 11 Cal.App.3d 557, 89 Cal.Rptr. 897 (1970)).

None of these policies stands in clear conflict with any federal statute, financial program or policy in this field. On the contrary, the federal government has traditionally recognized the autonomy of the states and their political subdivisions in controlling the use and development of land. See, generally, *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974). It would be highly inappropriate for this or any federal Court to interfere with the policy decision made by the California Supreme Court below absent any discernible federal constitutional interest.

CONCLUSION

The decision of the California Supreme Court does not place in jeopardy any fundamental constitutional right of owners of private property. The Fifth Amendment does not enshrine inverse condemnation as a remedy to protect the rights of private landowners. The California Supreme Court has protected those rights by leaving to private property owners appropriate judicial remedies to invalidate excessive

police power regulations. These are the remedies the Agins eschewed in favor of damages.

For the foregoing reasons, the Amicus NIMLO respectfully urges that the decision of the California Supreme Court be affirmed.

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March 1980

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Supreme Court, U.S.
FILED
MAR 21 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,

Appellants,

v.

CITY OF TIBURON,

Appellee.

On Appeal From the Supreme Court of California

BRIEF AMICUS CURIAE OF COUNTY OF SAN DIEGO IN SUPPORT OF APPELLEE

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INTEREST OF THE AMICUS CURIAE

Amicus County of San Diego, a political subdivision of the State of California, is responsible for planning and zoning decisions within its jurisdiction and is thus interested in and affected by the decision here under review.

Prior to the California Supreme Court's decision here, the state of the law concerning the inverse condemnation remedy for planning and zoning activities of local government in California allowed property owners to effect a forced acquisition

upon public entities of multi-million dollar properties resulting from unintentional errors of legislative and administrative judgment in land use planning, properties which the public agency had no intention of acquiring and no public need to acquire. The County of San Diego and other local governments in California have been affected by such judgments of forced acquisition which if upheld could potentially bankrupt some local governments. In this manner, such a damage remedy was subject to severe abuse.

It is the County's position that the decision of the California Supreme Court here under review is constitutionally sound and reflects the proper balance of private and public interests involved in local land use planning by holding that government may never engage in an unlawful exercise of its police power under any circumstances, and when such occurs, it must be invalidated. The decision recognizes that to require government to legitimatize an unlawful exercise of the police power by paying money damages in inverse condemnation is not only constitutionally unsound but has broad harmful effects on government's ability to effectively regulate land use and to remain solvent under modern fiscal restraints on local government.

QUESTIONS PRESENTED

1. Are appellants barred from receiving the relief they request for having failed to exhaust their administrative remedies?

2. Is it proper for this Court to reach the question of constitutionally permissible remedies for excessive land use regulations where it has been reasonably determined that the ordinance here in question is not excessive as a matter of law?

3. Does it violate the Fifth and Fourteenth Amendments to the United States Constitution for California to provide that

judicial invalidation is the only remedy available to a property owner whose property is affected by an alleged excessive regulation?

4. Do constitutional precedent and social policy considerations favor affirming the decision below since said result affords governmental entities maximum flexibility in dealing with land use problems?

STATEMENT OF THE CASE

The County of San Diego adopts the account of the facts and procedural posture of the case as stated in the Appellants' Brief.

ARGUMENT

I

APPELLANTS ARE BARRED FROM RECEIVING THE RELIEF THEY REQUEST FOR HAVING FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES

Appellants' complaint asserts that Ordinance No. 124 (N.S.) of the City of Tiburon "has completely destroyed the value of plaintiffs' property for any purpose or use whatsoever" (Complaint, Paragraph IX). And yet, in appellants' "Statement of the Case" herein, it is admitted that said ordinance authorized "(1) one-family dwellings; (2) open space uses; and (3) accessory buildings and accessory uses. Density of the buildings was limited to not less than one unit per five acres nor more than one unit per acre" (Appellants' Brief, page 7).*

Appellants have never attempted to develop their property though residential development is clearly permitted. Appellants have never submitted a tentative parcel map for local govern-

*Ordinance No. 124 (N.S.) was incorporated by reference in appellants' complaint.

ment approval. Appellants have never applied for special or conditional use permits, nor have they applied for administrative relief via rezoning or applied for a zoning variance.

The doctrine of the exhaustion of administrative remedies closely parallels the constitutional doctrine of "ripeness." Said doctrine has been defined by the California Supreme Court as follows:

> ". . . In brief, the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act. . . ." (*Abelleira* v. *District Court of Appeal* [1941] 17 Cal.2d 280, 292.)

The California courts have consistently followed the rule that a court does not have jurisdiction to determine the rights of a litigant unless the party seeking relief has first exhausted his administrative remedies (*Abelleira* v. *District Court of Appeal, supra,* at page 292). The issue of exhaustion of administrative remedy may be raised in California by demurrer on the grounds that the complaint does not state facts sufficient to constitute a cause of action or that the court lacks jurisdiction of the subject of the cause of action (*Igna* v. *City of Baldwin Park* [1970] 9 Cal.App.3d 909).

The purpose of requiring the exhaustion of administrative remedies is to eliminate any question as to how the legislative body would act with respect to a specific situation. In the case of zoning ordinances, the Court in *Metcalf* v. *County of Los Angeles* (1944) 24 Cal.2d 267, 270-271, stated:

> "A zoning ordinance places limitations upon the use of land within designated areas in accordance with the general policy adopted by the legislative body. The ordinance may be arbitrary and discriminatory in isolated cases as applied to certain property, and compliance therewith may present unusual difficulties in many other instances. But it is manifestly impracticable, if not impossible, to enumerate in the ordinance itself the varied factual situations to which the ordinance is not applicable because of constitutional objections. . . . Consequently, almost every zoning ordinance, including the one under consideration, contains provisions whereby an owner may apply to an administrative body for permission to put his land to a nonconforming use. As stated in *Thomas* v. *Board of Standards and Appeals,* 263 App.Div. 352 [33 N.Y.S.2d 219, 230], 'the variances permitted by the Zoning Resolution are in the nature of safety valves to prevent the oppressive operation of the Zoning Regulations in particular instances. . . . In our opinion, until an application for a variance or exception is made and acted upon, the 'legislative process remains incomplete.' (*Porter* v. *Investors Syndicate,* 286 U.S. 461, 468. . . .)"

Having failed to exhaust their administrative remedy, appellants' case is not ripe for constitutional adjudication and this Court should deny appellants relief on that basis alone. As this Court stated in *Parker* v. *Los Angeles* (1949) 338 U.S. 327, 333, "The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity."

II

IT IS NOT PROPER FOR THIS COURT TO REACH THE QUESTION OF CONSTITUTIONALLY PERMISSIBLE REMEDIES FOR EXCESSIVE LAND USE REGULATIONS WHERE IT HAS BEEN REASONABLY DETERMINED THAT THE ORDINANCE HERE IN QUESTION IS NOT EXCESSIVE AS A MATTER OF LAW.

The question of what remedy is constitutionally required in cases of alleged excessive land use regulation need only be addressed in a case where an excessive regulation is found.

The California Supreme Court has found that the Tiburon Ordinance here in question allows appellants to build between one and five residences on their property in contradiction to appellants' claim that development of their land is forever pre-

vented and taking cognizance of the use which appellants were entitled to make of their land found that the trial court was justified in finding that the ordinance did not unconstitutionally interfere with appellants' entire use of the land or impermissibly decrease its value (*Agins* v. *City of Tiburon* [1979] 24 Cal.3d 266, 277).

The County of San Diego contends that it was not improper on the facts of this case for the California Supreme Court to have concluded that, as a matter of law, the Tiburon Ordinance did not constitute an unconstitutional taking of appellants' property. It follows that the question of what remedy is constitutionally required under an excessive land use regulation may be reserved for another day.

III

IT DOES NOT VIOLATE THE FIFTH OR FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION FOR CALIFORNIA TO PROVIDE THAT JUDICIAL INVALIDATION IS THE ONLY REMEDY AVAILABLE TO A PROPERTY OWNER WHOSE PROPERTY IS AFFECTED BY AN ALLEGED EXCESSIVE LAND USE REGULATION.

The issue in this case is a very limited one: May a state, consistent with the Fifth and Fourteenth Amendments to the United States Constitution, limit the availability of damages under a theory of inverse condemnation to a landowner where a public agency has adopted a zoning ordinance which substantially limits the use of his property. The California Supreme Court in *Agins* v. *City of Tiburon, supra,* at pages 269-270, held that a landowner who is "so aggrieved may challenge both the constitutionality of the ordinance and the manner is which it is applied to his property by seeking to establish the invalidity of the ordinance either through the remedy of declaratory relief or mandamus, he

may not recover damages on the theory of inverse condemnation."

The Fifth Amendment to the United States Constitution provides that "private property shall not be taken for public use without just compensation." The mandate of this clause is simply that a person should not have to sacrifice his or her property to the public unless he or she is justly compensated. In cases of excessive land use regulations California has fashioned a remedy which satisfies the Fifth Amendment. The remedy is one that precludes the payment of damages which ratifies and transmutes an otherwise unconstitutional taking, but rather is one which allows the aggrieved property owner to challenge an alleged excessive regulation and thereby effect a repeal or rescission of the illegal action. If the aggrieved property owner is successful, the result is that an uncompensated taking is avoided. This is all that is required by the Fifth and Fourteenth Amendments.

This Court has always recognized the right of government, for the purpose of promoting the health, safety, morals or general welfare, to enact reasonable land use regulations and that such regulations do not constitute a "taking" under the Fifth and Fourteenth Amendments even though such regulations may prohibit or severely limit the most beneficial use of the property subject to the regulation (*Andrus* v. *Allard* [1979] ..... U.S. ....., 62 L.Ed.2d 210, 222-224; *Pennsylvania Central Transportation Co.* v. *New York City* [1978] ..... U.S. ....., 57 L.Ed.2d 631, 648-651). The test of "reasonableness" usually has been applied in determining the validity of land use regulation for such purposes (see, e.g., *Goldblatt v. Town of Hampstead* [1962] 369 U.S. 590, 592-596, 8 L.Ed.2d 130, 133-134). Judicial invalidation has been recognized by this and lower federal courts as a proper remedy in cases of excessive land use regulations. In *Pennsylvania*

Coal Co. v. *Mahon* (1922) 260 U.S. 393, plaintiff real property owners sought to enjoin defendant coal company from mining under its land. Under an 1878 deed, the coal company had transferred the subject property to the plaintiffs but had expressly reserved the right to remove all the coal under said property. In 1921, Pennsylvania adopted the Kohler Act which by its terms purported to take away pre-existing rights to mine under residential property. In discussing the Kohler Act, the Supreme Court held:

> "It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved." (*Pennsylvania Coal Co.* v. *Mahon, supra,* at page 414.)

The Court thereby remedied the illegal regulation by finding it invalid, at least in part. Though money damages were not in issue in *Pennsylvania Coal Co., supra,* the holding does support the proposition that judicial invalidation *is* a constitutionally permissible remedy in cases of excessive land use regulations.

The case of *Harrisonville* v. *Dickey Clay Co.* (1933) 289 U.S. 334 involved a suit by a company against a city for damages and injunctive relief in conjunction with injury to the company's property due to a city sewage plant. In *Harrisonville* the plaintiffs wanted injunctive relief whereas the city argued that they were entitled at most to damages. The Court's dicta explicitly recognizes that either damages or injunctive relief would satisfy the illegal taking of plaintiffs' property, and therefore allowed non-constitutional equitable principles to determine the outcome. (*Harrisonville* v. *Dickey Clay Co., supra,* at pages 339-341.)

Other federal courts have also recognized the propriety of judicial invalidation in cases of excessive land use regulations. (*Union Oil Company of California* v. *Morton* [9th Cir. 1975] 512 F.2d 743; *Art Neon Co.* v. *The City and County of Denver* [D. Colo. 1973] 357 F.Supp. 466.)

The above case law demonstrates that the requirements of the Fifth Amendment *can* be satisfied by invalidating offensive regulations. The decision of the California Supreme Court in *Agins* is a reasonable approach to developing remedies to solve the traditional "all-or-nothing" dichotomy between "just compensation" required for property taken by government under its power of eminent domain and the "no compensation" required for the governmental regulation of property under the police power, which includes zoning ordinances. In many cases, it is difficult to draw the line between a non-compensatory regulation and one that becomes a taking and invalid unless compensation is paid. Why should the remedy in such circumstances be left totally to the discretion of the landowner (or his attorney)? Certainly, there is no reason in either court precedent or in common sense why a property owner as a matter of federal constitutional law must be given a choice other than that established by the California Supreme Court in the *Agins* case.

IV

CONSTITUTIONAL PRECEDENT AND SOCIAL POLICY CONSIDERATIONS FAVOR AFFIRMING THE DECISION BELOW SINCE SAID RESULT AFFORDS GOVERNMENTAL ENTITIES MAXIMUM FLEXIBILITY IN DEALING WITH LAND USE PROBLEMS AND REASONABLY PROTECTS THE RIGHTS OF PROPERTY OWNERS.

Though appellants claim that social policy considerations favor reversal, the California Supreme Court correctly evaluated the social policy issue when it stated in the decision here on review:

> ". . . The expanding developments of our cities and suburban areas coupled with a growing awareness of the necessity to

preserve our natural resources, including the land around us, has resulted in changing attitudes toward the regulation of land use. Recognition of this historic trend is not new. The United States Supreme Court perceptively observed more than 50 years ago that with the passage of time and increased concentration of people 'problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and operation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, ... (*Euclid* v. *Ambler Co.* [1926] 272 U.S. 365, 386-387 . . . .)" (*Agins* v. *City of Tiburon, supra,* at page 275.)

Respected constitutional precedent such as *Euclid* v. *Ambler Co.* (1926) 272 U.S. 365 counsels that modern urbanization requires that government be given broad increasing latitude in dealing with land use problems. The *Agins* case is consistent with the spirit of such precedent.

If a private property owner is given the alternatives of either challenging an unconstitutional regulation or seeking damages for inverse condemnation, then the public may be required to obtain unwanted real property at great expense to the taxpayer. Truly, "government by purchase" becomes the norm. The possibility of windfall to the property owner cannot be overlooked.

As the continued effects of inflation and a tax revolution make fiscal planning more and more difficult for state and local entities, sound public policy favors the solution of the *Agins* case. Though the Fifth Amendment mandates that government shall not take private property without paying just compensation, nothing in such constitutional provision requires that the personal interests of a private citizen take priority over the public interest.

Under a system allowing only judicial invalidation, the defendant public entity actually has three alternatives: (1) if the challenged regulation is found to be invalid, the public entity may chose to do without the offending regulation; or (2) the public entity can institute eminent domain proceedings to acquire the property; or (3) it may amend the regulation consistent with constitutional requirements.

If appellants contentions are accepted, public entities will be forced to pay tremendous sums of money when slight errors of legislative judgment result in a judicial finding of an illegal taking. Once such a money judgment is entered, even repealing the regulation will not satisfy the legal obligation to satisfy the previously entered money judgment.

CONCLUSION

Appellants should receive no relief from this Court for several reasons. First, this case is not ripe for constitutional adjudication since appellants did not exhaust their administrative remedies. Secondly, the remedy issue need not be reached on the facts of this case since it has reasonably been found below that as a matter of law appellants have not been deprived of substantially all of the value of their property.

Should this Court reach the "remedy" issue, it is urged that both precedent and public policy favor affirmance of the decision of the California Supreme Court. It has been the central theme of this brief that the Fifth and Fourteenth Amendments do not dictate any particular remedy as long as the result is that private property is not taken without just compensation. Surely appellants would concede that, if Ordinance No. 124 (N.S.) of the City of Tiburon had been struck down as unconstitutional, their Fifth Amendment rights would thereby have been vindi-

cated. Therefore, since judicial invalidation satisfies the Fifth Amendment, there is no reason that a state must permit a property owner the alternative remedy of damages under a theory of inverse condemnation. For these reasons, the County of San Diego asks this Court to affirm the decision below.

DATED: March 20, 1980.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March, 1980, three copies of the Brief Amicus Curiae of County of San Diego in Support of Appellee were mailed, postage prepaid, to each of the following named persons:

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FOR ARGUMENT

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I

INTEREST OF AMICUS

Pursuant to Supreme Court Rule 42 (4), the Los Angeles County Counsel submits this brief in support of the City of Tiburon.

The County of Los Angeles is the largest local governmental entity in California. The

County is charged with land-use planning and zoning responsibility for an immense and varied area in which inadequate land use planning could prove disastrous to persons and property. This area, approximately a 4,000 square mile region, is twice the size of Israel and contains nearly as many people as the state of New Jersey.

The County of Los Angeles is presently engaged in the immense, legislatively-mandated project of drafting a general plan. This plan is required by law to include an open-space land element; zoning ordinances and other land-use control activities must conform with the open-space element of the general plan. See West's California Government Code, sections 65100, 65101, 65560, 65561, 65562, 65566, 65567 (and Supp. 1980).

The exposure of County resources to judgments for compensatory damages under a theory of inverse condemnation for the taking of private property by zoning activities creates an intolerable situation.

Los Angeles County planners and the local elected officials, the Board of Supervisors, believe that the rights of property owners are adequately safeguarded by the equitable remedies described in the Agins v. City of Tiburon decision, without subjecting the County to potentially disastrous and uncertain damage awards for inverse condemnation resulting from the entity's zoning or land-use planning activities.

Zoning disputes are frequently portrayed as a struggle between the zoning agency and the large developer of property. These disputes do exist.

However, there are also many zoning cases which involve the owners of small parcels of land which have previously been developed and the developer of raw land. The small landowners' holdings usually consist of their primary economic investment, their homes, which they feel are being potentially threatened by the developer's proposal. They fear any intense development or change in use which may negatively affect either their way of life, by more traffic, pollution, and congestion, or their financial investment.

Developers, on the other hand, often desire a zoning or use designation allowing them to maximize their construction on a given quantity of property in order to decrease the unit costs of construction and to increase the resultant profitability of the project.

The public entity has interests of its own in determining and setting the types and intensities of use of the property within its jurisdiction. In California, a public entity is mandated to designate certain broad ranges of uses by planning and zoning. West's California Government Code (Supp. 1980), section 65302. In addition, it is obligated to protect its citizenry from natural hazards, whether they be fires, landslides, flooding or other forms of disaster. The entity has an interest in not allowing excessive density and in providing various types of uses permitting different types of development for society.

It has an interest in not allowing random or extended development in remote or distant areas because each new development necessitates

expenditures of public funds for streets, sewers, street lighting, schools, hospitals, parks, and police and fire protection.

An area like Los Angeles County, with its 4,000 square miles of land consisting of desert, mountains, watercourses, seacoast, and coastal plain, demonstrates the enormous need for land-use community planning.

Mixed into each zoning dispute of any significance are the conflicting social interests of environmental protection and safety, jobs in the construction industry, housing needs, and the property tax base.

It is in this context that local planning officials must make their decisions on the uses of property within the jurisdiction. Obviously, studies must be made by the planners and by the various interested parties. Public hearings must be held to allow the expression of views and opinions to the planning board.

Yet, at some point a decision must be made by the planning agency.

We respectfully submit that a public entity should not be required to face the potential payment of compensatory damages resulting from its good faith exercise of the planning and zoning power. Rather, we contend that the decision of the California Supreme Court in the case of Agins v. City of Tiburon, 24 Cal. 3d 266 (1979), which requires a property owner to test the constitutionality of a zoning ordinance by an equitable action rather than by an action for

compensatory damages, adequately protects the rights of property owners under the taking clause of the Fifth Amendment.

II

FACTS AND HOLDING IN AGINS V. TIBURON

Agins v. Tiburon is reported at 24 Cal. 3d 266, 157 Cal. Rptr. 372.

Because this case has generated an unusual amount of public controversy for a zoning case, it is important to carefully set forth the salient facts pleaded (and not pleaded) by the property owners and to state concisely the holding by the California Supreme Court.

A. Salient Facts Alleged In the Complaint, Not Alleged, Or Subject to Judicial Notice

(1) The subject property is five acres of undeveloped land of a scenic nature. Joint Appendix (hereinafter "J.A."), page 4, para. III.

(2) The City of Tiburon contemplated acquisition of the subject property for open space purposes, filed an eminent domain action to acquire the subject property on December 4, 1974, and ultimately dismissed the action, after filing a notice of abandonment, on February 5, 1975.

J.A. 5-10.

(3) A zoning ordinance of the City of Tiburon, No. 124 N.S., which was expressly incorporated by reference in the complaint, J.A. 5, para. IV, effective June 28, 1973, would on its face allow a maximum of five single-family dwellings or a minimum of one, depending on the design and an environmental impact report. Agins v. Tiburon, 24 Cal.3d 266, 271, 157 Cal. Rptr. 372, 374 (1979). The ordinance on its face would allow residential development, for which the appellants purchased the property and which they allege is its highest and best use. J.A. 4, para. III.

(4) The complaint does not allege the intensity of use intended by the appellants.

(5) There is no allegation as to what the zoning was on the subject property before the effective date of No. 124 N.S. or what type or density of development might have been permitted under the prior ordinance.

(6) There is no allegation that the appellants have ever applied to use or improve their property or that they have sought a definitive statement as to how many dwelling units they would be allowed to build. Agins v. Tiburon, 24 Cal.3d 266, 271, 157 Cal.Rptr. 372, 374 (1979).

(7) There is no allegation that appellants have ever requested from the proper zoning authorities a variance, a conditional use permit, or a change of zone to allow greater density in the

development of their property than that allowed on the face of the ordinance.

(8) The City of Tiburon, and all cities and counties of California, are required by California law to prepare a general plan for use of land within their jurisdiction which includes the general location and extent of land for housing, business, industry, and open space. West's California Government Code (and Supp. 1980), §§65302 subd. (a), 65561, 65562, 65563, 65567, 65860. Zoning ordinances must be consistent with the local entity's general plan. Id., §§65567, 65860.

(9) The California Legislature's definition of "open space" does not include residential development in any form. West's California Government Code (Supp. 1980), §65560 subd. (b)(1) through (4). A mixture of open space and residential planned development is not prohibited.

(10) The regulation of lot-sizes and density of single-family residences per acre is a very common and very old purpose of zoning ordinances for single-family residential development. See Simon v. Town of Needham, 311 Mass. 560, 42 N.E. 2d 516, 141 A.L.R. 688 (1942). A minimum lot size of one single-family residence for five acres would not be unusual. See e.g., Fischer v. Bedminster Township, 11 N.J. 194, 93 A.2d 378 (1952); Honeck v. County of Cook, 12 Ill.2d 257, 146 N.E.2d 35 (1957).

(11) There is no allegation by appellants that they intended to make a more intense use of the land than the least intense use allowed on the

face of the challenged ordinance. Therefore, it is doubtful that they have satisfied the "case or controversy" requirement (or the "standing" requirement) to challenge the ordinance for failure to allow intense enough development of their property. Arlington Heights v. Metropolitan Housing Authority, 429 U.S. 252, 261-63 (1977) (Developer has standing, and there is a case or controversy, to challenge a zoning action on 14th Amendment grounds, when it planned and intended to make a specific use of the subject parcel which was unconstitutionally prohibited by the zoning authority).

(12) Appellants allege that they have been damaged to the extent of the full fair-market value of the property, two million dollars, J.A. page 7, para. X.

B. The Holding In Agins v. City Of Tiburon, 24 Cal. 3d 266, 157 Cal. Rptr. 372 (1979)

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(1) The holding of the case is expressly limited to a zoning ordinance. Id., 24 Cal. 3d at 269.

Under California law and the common law of the United States, zoning is a power of municipal corporations to divide the municipality into various land-use districts. The Standard State Zoning Enabling Act, produced by the United States Department of Commerce in 1926, upon which most state acts are based, describes zoning as follows:

"For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings . . . the percentage of lot that may be occupied, the size of yards . . . the density of population and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes. . . . For any and all of said purposes the local legislative body may divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this act. . . ." Reprinted in Urban Planning and Land Development Control Law, by Donald G. Hagman (West Publishing Co., Hornbook Series, St. Paul, Minn., 1971) at 80.

Zoning is only one type of exercise of the police power by local government, a highly specialized and traditional governmental activity with extensive case law. There is no reason to presume that this holding will be applied to other kinds of governmental entities or other police powers exercised by government.

(2) Inverse condemnation action for compensatory damages will not lie when the alleged governmental taking without just compensation is caused by municipal zoning ordinance or exercise of the municipal zoning power. Based on policy considerations, the proper remedies are equitable,

including declaratory relief and mandate to declare the ordinance unconstitutional and void as violative of the taking clause or to compel the granting of building permits and subdivision approvals when unconstitutionally denied. Agins v. Tiburon, supra, 24 Cal. 3d at 275-277.

(3) A municipal zoning ordinance will be unconstitutional under the taking clause of the Fifth Amendment and subject to invalidation when the effect is to deprive the owner of substantially all reasonable use of his land. Id., supra, at 277.

This is the Holmes test for a taking, adopted by the majority in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158 (1922), not the Brandeis test of the dissent in that case.

(4) When the property owner does not allege with specificity how an ordinance has been applied to his property, or that it has in fact been applied to his property by the municipal government so as to unconstitutionally deprive plaintiff of all reasonable use of the land, the court will disregard an allegation of "taking as applied" as conclusionary, on demurrer, and look to the face of the zoning ordinance to see if reasonable uses are allowed. Agins v. Tiburon, supra, 24 Cal. 3d at 277.

(5) The court also held that the "pre-condemnation activity" pleaded, which included the authorization of studies recommending the acquisition of the property for open-space purposes and the issuance of bonds for that purpose, and

the filing and abandonment of the eminent domain proceeding, did not state a cause of action for inverse condemnation damages under California law. Agins v. Tiburon, supra, 24 Cal. 3d at 277-78, citing Klopping v. City of Whittier, 8 Cal. 3d 39, 104 Cal. Rptr. 1 (1972).

The Agins court did not overturn Klopping. They merely held that the facts pleaded do not fall within the inverse cause of action described in Klopping.

There is ample California authority to support this holding of the Agins court. See West's California Code of Civil Procedure (Supp. 1980), sections 1268.510, 1268.610; see also Selby v. San Beunaventura, 10 Cal. 3d 110, 120-21, 109 Cal. Rptr. 799 (1973). Accordingly, this part of the holding is not unreasonable or arbitrary.

Even if there were an erroneous application of state law, adequate in itself to protect constitutional rights, no issue would be raised for this court under the due process clause of the Fourteenth Amendment, unless the ruling were totally arbitrary or capricious. American Ry. Express v. Kentucky, 273 U.S. 269, 272-73 (1926); Watson v. Kenlick Coal Co., Inc., 498 F.2d 1183, 1187-89 (1974).

Therefore, since Agins does not purport to eliminate the action for inverse damages for pre-condemnation activities in California, but merely interprets California law, holdingthat no such cause of action is stated by the facts of the case, there is no Fourteenth Amendment issue before this court as to that part of the Agins holding.

III

THE FOURTEENTH AMENDMENT ALLOWS THE CALIFORNIA SUPREME COURT TO LIMIT PROPERTY OWNERS TO EQUITABLE RELIEF IN THIS CASE.

The acts and decisions of the California Supreme Court are "state action" and the taking clause of Fifth Amendment applies to the states through the due process clause of the Fourteenth Amendment. New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1963); Chicago, B. and Q. Ry. Co. v. Chicago, 166 U.S. 226, 234-41 (1897).

The settled rule in Fourteenth Amendment questions is that state judicial action need not provide specific legal means of vindicating constitutional rights as long as the remedy provided is adequate. A state's judiciary may even substantially change the means of vindicating the rights as long as an adequate remedy is substituted.

A state is not required by the Fourteenth Amendment to permit a damage action, or any specific form of action for the vindication of constitutionally protected rights as long as the available remedy is adequate to protect rights guaranteed by the Constitution. Gibbes v. Zimmerman, 290 U.S. 326, 332 (1933); Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co., 284 U.S. 151, 159-60 (1931); Iowa Central Ry. Co. v. State of Iowa, 160 U.S. 389, 393 (1896); Oshkosh Waterworks Co. v. Oshkosh, 187 U.S. 437, 439 (1902).

This principle applies to the appellate courts of a state as well as to the state legislature. American Railway Express v. Kentucky, 273 U.S. 269, 274 (1927).

The federal constitutional question under the Fourteenth Amendment in the case at bar is whether the state remedy described in Agins is adequate to vindicate and protect property rights under the taking clause.

First, as argued infra, the California Supreme Court has carefully followed this Court as to the taking rule. It does not purport to lessen the force of the taking doctrine but to specify the proper remedy if an unconstitutional zoning activity were to occur.

It does not hold that henceforth property may be taken by zoning without just compensation.

It holds that the mandatory nature of the words "nor shall private property be taken for public use without just compensation" will be given full effect, in that no zoning ordinance may be both a valid exercise of the police power and a taking in violation of the Fifth Amendment. If it violates the taking clause it is void, not an informal exercise of the power of eminent domain.

The California court holds that a property owner faced with a zoning ordinance which is unconstitutional on its face or as applied, should obtain an invalidation or should compel by mandate a variance, map approval, or permit.

It is important to remember that the California Supreme Court has never held that zoning activities, which constitute a taking of property without just compensation, give rise to a cause of action for money damages under a theory of inverse condemnation. In H. F. H., Ltd. v. Superior Court, 15 Cal. 3d 508, 518 note 16, 125 Cal. Rptr. 365 (1975), the court expressly refused to rule on the question.

California courts have never allowed money damages on an inverse condemnation theory in a true zoning case except for Eldridge v. Palo Alto, 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976), an intermediate-level appellate decision, which was expressly overruled on this point by the California Supreme Court in Agins v. Tiburon, supra, 23 Cal. 3d 266, 273.[1]

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[1] All earlier zoning/taking cases, in which damages for inverse condemnation were allowed involved factual situations distinctly different and easily distinguishable from the facts pleaded in Eldridge or Agins. See extensive analysis of all early zoning/taking/inverse cases in California, H. F. H., Ltd. v. Superior Court, supra, 15 Cal. 3d at 513-18 and notes 4 through 14. It can be strongly argued that Eldridge is based on serious misinterpretation of the very cases discussed by the H. F. H., Ltd. court. See Hall, Eldridge v. City of Palo Alto; Aberration or New Direction in Land Use Law?, 28 Hastings L. J. 1569, 1584-91 (1977). Many California cases in the inverse area are confusing because the California Constitution prohibits damaging of property without compensation as well as taking, an issue not raised by the taking clause of the Fifth Amendment. See West's California Constitution (Supp. 1980), Article 1, section 19.

It is also very important to note that the United States Supreme Court has often upheld the rights of property owners to be free from uncompensated takings by the police power and yet have never upheld or required the award of damages under a theory of inverse condemnation in a zoning or a land-use regulation case.

IV

EQUITABLE RELIEF IS ADEQUATE UNDER CALIFORNIA LAW TO PROTECT LANDOWNERS' PROPERTY RIGHTS IF A LOCAL ZONING ORDINANCE WOULD CONSTITUTE A TAKING

The California court has not changed the test for when zoning becomes taking. This will be discussed below.

It has said that if a local zoning ordinance (on its face or as applied) would constitute a non-compensated taking, under the applicable tests, it is void; the property owner's property rights are vindicated by a declaration of voidness and/or by mandate. Agins v. Tiburon, supra, at 273; see also MacLeod v. Los Altos, 182 Cal. App. 2d 364, 369-70, 6 Cal. Rptr. 326 (1960).

Obviously, the greatest protection of rights available to the property owner, which is described in Agins, is that a zoning ordinance which violates the taking clause is subject to invalidation. No valid

zoning ordinance can also be an uncompensated taking. Eldridge v. Palo Alto, 57 Cal. App. 3d 613, 621, 129 Cal. Rptr. 575 (1976), which held otherwise was expressly overruled in Agins. Agins v. Tiburon, supra, at 273.

In practical terms, the equitable enforcement and protection of the constitutional right to be free of zoning which violates the taking clause is an effective remedy under our state law and procedure for the following reasons:

1. Priority of Trial Setting and Speedy Resolution: The action for declaratory relief is specifically entitled to priority in setting for trial. West's California Code of Civil Procedure, §1062a. Mandamus, either administrative or traditional, West's California Code of Civil Procedure, §§1084 to 1094.5, 1107-08, is a special proceeding and trial may be had and the writ issued or denied very quickly. The alternative writ, which must issue within five days, includes the date for the hearing on the merits. West's California Code of Civil Procedure, §§1088, 1107.

2. The action for declaratory relief is well-established in California as a means to void a zoning ordinance which is unconstitutional or unconstitutional as applied. Skalko v. City of Sunnyvale, 14 Cal. 2d 213, 216, 93 Pac. 2d 93 (1939).

3. The traditional writ of mandate is long-established in California as a means of challenging unconstitutional zoning and zoning actions. Roman Catholic Welfare Corp. v. Piedmont, 45 Cal. 2d 325, 334, 289 Pac. 2d 438 (1955); Reynolds v. Barrett, 12 Cal. 2d 244, 249-52, 83 Pac. 2d 29 (1938);

Floresta, Inc. v. San Leandro, 190 Cal. App. 2d 599, 612, 12 Cal. Rptr. 182 (1961).

4. Administrative mandate is also an effective remedy. If the challenged ordinance provides for administrative hearing and appeals, as most do, then traditional or ordinary mandamus is not the proper remedy; rather, the proper remedy is administrative mandate. West's California Code of Civil Procedure, §1094.5; see also Selby v. San Buenaventura, 10 Cal. 3d 110, 128, 109 Cal. Rptr. 799 (1973).

5. The enforcement of an unconstitutional zoning ordinance may be enjoined. MacLeod v. Los Altos, 182 Cal. App. 2d 364, 369-70, 6 Cal. Rptr. 326 (1960); McCaslin v. Monterey Park, 163 Cal. App. 2d 339, 346-48, 329 Pac. 2d 522 (1958).

Also, the following strong public policy reasons support the California Supreme Court's decision limiting property owners to equitable relief in this type of zoning case:

(1) Damage awards under a theory of inverse condemnation would chill the crucial planning process because of the threat of a judicial finding of an unintended taking.

(2) The power of eminent domain should only be exercised intentionally by local government and in accordance with the very strict procedural requirements expressly mandated by the California Legislature in the Eminent Domain Law because the exercise of the power of eminent domain always involves the expenditure of public funds and the taking

of private property.

The strict procedural requirements of the Eminent Domain Law are obviously designed to provide the public an opportunity for debate about the nature of the project (and its approximate cost) and to give the property owner an opportunity to object. See West's California Code of Civil Procedure (Supp. 1980), §§1245.220 (governing body must adopt a resolution of necessity), 1245.230 (resolution must describe the property so that it can be identified and the public project for which it is necessary), 1245.235 (the public hearing must be noticed to all property owners), 1245.240 (two-thirds vote of governing body necessary for adopting the resolution).

The restrictions and safeguards of the Eminent Domain Law would be totally negated if the judiciary could determine, after the fact, not only that a legislative act, zoning, constituted a taking without compensation, but that it also constituted an exercise of the power of eminent domain. There would be no chance at all for public debate on whether the proposed public use was worth the likely cost or worth the public and private inconvenience.

This judicial usurpation of the legislative power of eminent domain, by ordering compensation for an unintended taking by zoning, raises very serious separation-of-powers problems.

This Court has previously held that the judicial branch should show restraint where the legislative power of eminent domain is involved.

See Berman v. Parker, 348 U.S. 26, 32, 33 (1954) (Exercise of the power of eminent domain is not within the province of the judicial branch).

V

THE AGINS TEST FOR WHEN AN UNCOMPENSATED TAKING WOULD OCCUR BY A LOCAL ZONING ORDINANCE IS EXACTLY THE TEST ENUNCIATED BY THIS COURT

It is very clear from the opinion that the California Supreme Court in Agins has adopted the rule of Justice Holmes in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), as opposed to the rule favored by Justice Brandeis. The disagreement between the majority and dissenting opinions in that case is a very important one and reflects an academic controversy that is still very much alive.

This Court has recently reaffirmed the Holmes test in Penn. Central Transp. Co. v. New York City, 438 U.S. 104, 127-28 (1978).

In Pennsylvania Coal Justice Holmes wrote for the majority that, although the challenged regulation, which outlawed the mining of coal supporting developed urban land was unquestionably for a valid and very important public purpose, it was unconstitutional as an uncompensated taking for public use because the regulation ended the only reasonable use which the owner of the subjacent

coal could make of his property and because the statute did not provide for compensation.

An important dissent by Justice Brandeis in that opinion states a very different rule.

Justice Brandeis' dissent states that even though all use of the owner's property was destroyed by the statute, the statute cannot constitute a taking since the statute was to protect the public and since the prevention of removal of support for urban land did just that.

He relied on cases holding that state statutes which outlawed the manufacture of oleomargerine and the distilling of liquor were not uncompensated takings of properties which had no other reasonable use than the manufacture of oleomargerine and the distillation of liquor. Powell v. Pennsylvania, 127 U.S. 678, 682 (1888); Mugler v. Kansas, 123 U.S. 623, 668-69 (1887).

This conflict about the proper interpretation of the taking clause, in cases which only involve regulation of use of land rather than physical invasion or public appropriation, is still vehemently with us.

But, in any event, the majority opinion in Pennsylvania Coal, which strongly protects property rights, is the law and the California Supreme Court has expressly adopted the Holmes test. It does not hold that the unquestionable public benefit from minimum lot-size zoning or from zoning which regulates the density of residential use of scenic land is the test of a taking by zoning.

They clearly hold that the test is, even though the social purpose and function of the zoning may be unquestioned, whether the owner has any reasonable use of his land. Agins v. Tiburon, supra, 24 Cal. 3d at 277.

VI

IF REASONABLE USE OF THE PROPERTY IS ALLOWED ON THE FACE OF THE ORDINANCE, NO TRIAL ON THE MERITS IS WARRANTED WHEN OWNERS HAVE NOT PURSUED ANY ADMINISTRATIVE REMEDIES.

The challenged ordinance on its face could allow a maximum of five dwelling units on the Agins' five acres or a minimum of one dwelling unit. Agins v. Tiburon, supra, 24 Cal. 3d at 271.

The Agins do not plead that they made an application for a building permit, for tentative subdivision approval, for a variance, or for a change of zone. Id., at 271. Nor have they even asked for a definite statement as to how many dwelling units they could build. Id.

The trial court ruled on demurrer that there had been no taking because on the face of the ordinance, incorporated by reference in the complaint, there was a reasonable use of the subject five acres of residential property, one to five residences.

The Agins now contend that because the court disregarded their purely conclusionary allegation that the zoning ordinance as applied gave them no reasonable use, they have been unfairly denied a trial.

Under the law of California, a fact-pleading jurisdiction, a court may disregard conclusionary allegations, or allegations which are a sham, on demurrer. West's California Code of Civil Procedure, §425.10(a); Semole v. Sansoucie, 28 Cal. App. 3d 714, 717-19, 104 Cal. Rptr. 897 (1972); Neal v. Bank of America, 93 Cal. App. 2d 678, 682-83, 209 Pac. 2d 825 (1949); see also Hecton v. Dept. of Transportation, 58 Cal. App. 3d 653, 657, 130 Cal. Rptr. 230 (1976).

Since appellants have never made any application to use the property or to obtain a variance or even a change of zone, the ordinance has never been applied to their property by the zoning officials of the City of Tiburon.

It is a good rule that one should not be able to challenge a zoning ordinance as applied until he has administratively sought some relief, created an evidentiary record of the engineering or economic or construction problems, received a ruling on the specific request, conducted an administrative appeal, and allowed the zoning entity to closely examine the proper application of the ordinance to his property.

Assuming that a variance or a change of zone is in fact necessary for the Agins property to be developed economically, can the city be

expected to grant relief from a zoning ordinance which the injured property owner has not requested? The local zoning officials have no reason to know that the Agins are aggrieved except for this lawsuit. The "as applied" issue herein would require the Supreme Court of Marin County to sit, ab initio and with no prior pursuit of administrative relief, as a local zoning appeals board for the tiny City of Tiburon.

A specific zoning for many California counties could extend for hundreds of square miles. In such large areas it is possible that some individual parcels could be improperly zoned. In order to prevent chaos in the courts and to uphold the local zoning power, owners should be required to seek some administrative relief prior to seeking judicial intervention.

In reality the Agins are saying that the ordinance is unconstitutional as it might be applied to their property.

California law requires that a land owner pursue administrative remedies in zoning cases before seeking judicial relief and the failure to so plead is grounds for general demurrer. Igna v. City of Baldwin Park, 9 Cal. App. 3d 909, 914, 88 Cal. Rptr. 581 (1970).

This is a good requirement under the separation-of-powers doctrine and for judicial economy.

VII

NO VESTED PROPERTY RIGHT IN EXISTING ZONING OF UNDEVELOPED LAND.

In the subject complaint there is no allegation as to what the zoning was on the property before the challenged ordinance was enacted, so it is not clear whether or not this case involves a "down-zoning" of raw land.

If this is the case, it is a well-established rule of American property law that a landowner has no vested right in existing zoning of a parcel of land until he obtains a building permit and substantially starts construction. Avco Community Developers, Inc. v. South Coast Regional Commission, 17 Cal. 3d 785, 791, 132 Cal. Rptr. 386 (1976) (Cert. Den. 429 U. S. 1083, 51 L. Ed. 2d 529); Trans-Oceanic Oil Corp. v. Santa Barbara, 85 Cal. App. 2d 776, 782-98, 194 Pac. 2d 148 (1948).

From this principle it follows that substantial diminution in value because of down-zoning is not a taking under the Fifth Amendment. Penn. Central Transp. Co. v. New York City, 438 U. S. 104, 131 (1978).

The market value of land attributable to non-vested existing zoning or anticipated zoning is not a reasonable "distinct investment-backed expectation," as that phrase is used by this Court in the Penn Central case, Id. at 124, for just this reason.

A reasonably prudent buyer of raw land usually pays a price based on an intended use; and he makes the transaction contingent on the vesting of the right to make such use of the property by means of the escrow instructions or an option. If he does not, he is either paying a lower price which reflects the uncertainty of his intended use, or he is making a big mistake.

Any alleged market value of land which is based on non-vested zoning is highly speculative because the "value" is based on the hope that the use will be allowed when there is no vested right to make that use of the property.

The taking clause reads "nor shall private property be taken for public use without just compensation." Under the Trans-Oceanic Oil and Avco cases there is no vested property right to existing zoning until a building permit has been granted and detrimentally relied on. There is no reasonable or prudent "investment backed expectation" until vesting and no "property" which can be taken.

Thus, mere down zoning, when there has been no vesting, cannot constitute a taking.

VIII

CONCLUSION

It is clear that the Fourteenth Amendment does not require of state courts any specific form

of legal vindication of constitutional rights as long as the rights are adequately protected.

The appellants' contention that in the event of judicial invalidation, California local governments will conspire to frustrate the equity power of the California judicial branch by playing vindictive games with property owners presumes malice on the part of local government and weakness of the judiciary. Neither presumption is valid.

The equity power is a strong one and this court should wait and see how it is used by the trial courts of California in light of the Agins decision. The California courts will effectively protect property owners from unconstitutional use of the zoning power.

Furey v. Sacramento, 24 Cal. 3d 862, 157 Cal. Rptr. 684 (1979) (Cert. Den. ___ U.S. ___), is an example of how the California Supreme Court is applying the principles of the Agins decision. In that case a landowner's undeveloped property was zoned "agricultural open space." He had earlier been specially assessed for sewers which were appropriate to a more intense use. The court ruled that the zoning would be unconstitutional as to him and equitable relief should lie, unless he was reimbursed for the substantial contribution as he had made to the special sewer assessment district and reassessed.

Equity provides ample protection for property rights in zoning disputes and is the best remedy from a public policy view point.

This court is urged to affirm the decision in Agins.

Respectfully submitted,

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FOR ARGUMENT

Supreme Court, U.S.
FILED
MAR 24 1980
MICHAEL RODAK, JR., CLERK

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979
No. 79-602

DONALD W. AGINS AND BONNIE G. AGINS,

Appellants,

vs.

CITY OF TIBURON,

Appellee.

Appeal from the Supreme Court of California

AMICI CURIAE BRIEF OF THE AMERICAN PLANNING ASSOCIATION AND THE CALIFORNIA CHAPTER OF THE AMERICAN PLANNING ASSOCIATION IN SUPPORT OF APPELLEE

Pursuant to Supreme Court Rule 42, the National Organization of the American Planning Association and its California Chapter respectfully submit this brief amici curiae in support of Appellee City of Tiburon. Consent to the filing of this brief has been granted in writing to amici by counsel for both

parties. These letters of consent have been filed with the Clerk of the Supreme Court.

INTEREST OF AMICI CURIAE

The American Planning Association and the California Chapter (hereinafter collectively referred to as "APA") were organized in 1978, as the result of a consolidation of the American Institute of Planners (founded in 1917) and the American Society of Planning Officials (founded in 1934). The APA today is a 23,000-member national organization dedicated to the advancement of the art and science of planning for the comprehensive development of communities, cities, regions and states, and to the participation of citizens in the process of planning. It represents both city and regional planners including professional practitioners (from both the public and private sector), educators, elected officials, and citizen planners.

The California Chapter, the APA's largest, representing 3,000 members, works together with the parent organi-

ation in support of comprehensive planning. Together they both have a long history of participation in public policy issues. For example, Alfred Bettman, whose amicus curiae brief in the case of Village of Euclid v. Ambler Realty Co., 272 U.S. 385 (1926), has been frequently noted in the history of zoning law, was a founder and active leader in APA's predecessor organization. He is memorialized in an annual Bettman Symposium on planning law conducted by APA. The APA's predecessor organization filed an amicus curiae brief accepted by this Court in City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976). Additionally, both the national APA and its California Chapter provide members with educational and research services and have in the past retained professionals to assist in undertaking an active role in the California and other state legislatures in support of comprehensive planning. APA may be the largest researcher and publisher on land use law, including its Land Use Law and Zoning Digest, a monthly publication

since 1949.

As professional and lay participants in local, regional and state planning decisions, amici are directly impacted by the issues raised in the instant case now pending.

SUMMARY OF THE ARGUMENT

Deference to state courts on questions of local land use regulation serves especially important interests of federalism. Land use control is a governmental function no less "essential to [the] separate and independent existence" of the states, National League of Cities v. Usery, 426 U.S. 833, 851 (1976), than are the fields of education and law enforcement policy in which this Court has commanded federal restraint. State courts have far greater familiarity with the evolving local conditions that have compelled different statutory approaches to the myriad problems facing the several states. They have also developed effective equitable remedies to invalidate and

restrain unconstitutional exercises of the police power by local land use authorities. But when "forced compensation" is sought by property owners who contend that local land use controls have "taken" their property by diminishing its value, the judicial branch -- at both federal and state levels -- is ill-equipped to develop reasoned legal doctrines and to fashion effective remedial mechanisms. Nor do the claims asserted by such property owners merit special judicial protection by the federal courts.

California, like many other states, has recently enacted important statutory reforms mandating local governments to develop and to implement comprehensive planning. The required local comprehensive plans are intended to bring about a greater measure of rationality and fairness to the local land use decisionmaking process. Given the particular conditions existing in California, the creation of a novel and unnecessary remedy of money damages in inverse condemnation actions that

challenge unwitting "takings" by local government authorities could seriously impact the fiscal integrity of these local governments. The prospect of such potentially devastating financial consequences will inevitably cause local planners and decisionmakers to weaken their efforts to develop and implement such fair and rational comprehensive land use controls. Important goals of efficiency and equity will thereby be profoundly compromised.

ARGUMENT

I. PRINCIPLES OF FEDERALISM AND COMITY REQUIRE THAT THE CALIFORNIA COURT'S DECISION SHOULD BE UPHELD.

Principles of federalism and comity require that federal courts exercise restraint in intervening in issues critical to state sovereignty and local autonomy. E.g., Ingraham v. Wright, 430 U.S. 651 (1977) (state procedures for corporal punishment in schools); Paul v. Davis, 424 U.S. 693 (1976) (police conduct resulting in alleged defamation); Rizzo v. Goode, 423 U.S. 362 (1976) (police department organization); Huffman v. Pursue, Ltd., 420 U.S. 592, 599-605 (1975) (state civil proceedings); San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 40-43 (1973) (complex issues of finance and educational policy); Younger v. Harris, 401 U.S. 37 (1971) (pending state criminal proceedings). Cf. National League of Cities v. Usery, 426 U.S. 833 (1976) (federal minimum wage and maximum hour provisions struck down as impermissibly intruding on "integral government services"); Warth

v. Seldin, 422 U.S. 490 (1975) (standing denied to various parties seeking to challenge a local zoning ordinance).

A. Local Land Use Control Has Historically Been Recognized As A Matter of Unique Importance to the States About Which State Courts Have More Familiarity and Expertise.

The federal courts have consistently recognized the desirability of deferring to the state courts on issues related to local exercises of the police power to regulate local land use. The state courts, including the California courts, have developed substantial expertise in complex, local land use litigation and have a high degree of familiarity with, and understanding of, local planning and zoning processes, state planning and zoning legislation, and the unique state and local problems which the planning and zoning laws address.

As early as Welch v. Swasey, 214 U.S. 91 (1909), this Court upheld a state supreme court's ruling that an ordinance limiting the height of buildings in one part of Boston was a valid

exercise of the police power, stating that whether such a local ordinance promotes "general and public welfare" is an issue which "the state court is familiar with, but a like familiarity cannot be ascribed to this Court." Id. at 105. The Court concluded that it has "the greatest reluctance in interfering with the well considered judgments of the courts of a state where people are to be affected by the operation of the law . . . . [The state court determination] will only be interfered with . . . where the decision is, in our judgment, plainly wrong." Id. at 106.

More recently, in City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976), the Court directed persons objecting to the results of a zoning referendum on state and federal grounds to raise their challenges "in state court, where the scope of the state remedy available . . . would be determined as a matter of state law, as well as under fourteenth amendment standards." Id. at 677.

> [State courts] are accustomed to reviewing local ordinances and are

> in a better position than a federal court to delineate the boundaries of local discretion in the area of land use in the first instance. For the court to sit as a board of zoning appeal from actions by a local city council and circumscribe local power * * * would cause needless conflict with the administration by the state courts of concerns with which they have infinitely more expertise and experience.

Fralin and Waldron, Inc. v. City of Martinsville, Va., 370 F.Supp. 185, 190-91 (W.D. Va. 1973).

> [S]tate land use policy is a sensitive matter subject to comprehensive local regulation. For a federal court to exercise its jurisdiction in areas of important state domestic policy creates an "unseemly conflict between two sovereignties, [and] the unnecessary impairment of state functions * * *" Martin v. Creasy, 360 U.S. 219 . . . (1959).

Kent Island Joint Venture v. Smith, 452 F.Supp. 455 (D. Md. 1978).

The growing reluctance of federal courts to interfere in local land use matters is reflected in many recent opinions where they have abstained. In Rancho Palos Verdes v. City of Laguna Beach, 547 F.2d 1092 (9th Cir. 1972),

the court exercised abstention under the doctrine of Railroad Comm'n of Texas v. Pullman, 312 U.S. 496 (1941). The court dismissed the case but retained jurisdiction without ruling on the issue of whether a development moratorium and interim open space element effected a taking without just compensation. The court discussed the propriety of avoiding interference with state land use policy, as follows:

> [L]and use planning . . . is today a sensitive area of social policy . . . . This is not only because much of the legislation is recent. California is attempting to grapple with difficult land use problems through new policies and new mechanisms of regulation. The state is also struggling with the problem facing cities and counties in those cases where their zoning efforts to preserve open space in response to the state's announced policy . . . may unwittingly have resulted in a seizure of property rights that they did not intend and cannot afford. Federal courts must be wary of intervention that will stifle innovative state efforts to find solutions to complex social problems.

547 F.2d at 1095. See also Newport Investments, Inc. v. City of Laguna

Beach, 564 F.2d 893 (9th Cir. 1977); Sea Ranch Ass'n v. California Coastal Zone Conservation Comm'ns, 537 F.2d 1058 (9th Cir. 1976); Ahrensfeld v. Stephens, 528 F.2d 193 (7th Cir. 1975); Fralin and Waldron, Inc. v. City of Martinsville, Va., 493 F.2d 481 (4th Cir. 1974); Hill v. City of El Paso, 437 F.2d 352 (5th Cir. 1971); Beck v. California, 479 F.Supp. 392 (C.D. Cal. 1979); Kent Island Joint Venture v. Smith, 452 F.Supp. 455 (D. Md. 1978); Planned Parenthood of Maryland v. Mayor and Alderman of the City of Annapolis, Civ. No. N-78-501 (D. Md. Apr. 7, 1978); Webber v. Skoko, 432 F.Supp. 810 (D. Ore. 1977).[1/]

1/ In Beck v. California, supra, the aggrieved property owner sued the State of California, the California Coastal Commission and its executive director for money damages in an inverse condemnation action based on the fourteenth amendment and 42 U.S.C. §§ 1983 and 1985 for their failure to allow construction of a single-family residence on the Malibu coastline. The court abstained, again emphasizing the importance of deference to state policy:

In determining whether [cont'd.]

B. Complex Schemes for Remedying Inequities of Zoning Perceived by Aggrieved Property Owners Are Most Appropriately Developed by the State Legislatures and Local Governmental Bodies Rather Than by the Courts.

In Village of Euclid v. Ambler Realty Co., 272 U.S. 385 (1926), this Court's landmark decision upholding the general constitutionality of local zoning ordinances, the opinion expressly recognizes that the problems and conditions to which the local zoning power is addressed inevitably vary from jurisdiction to jurisdiction. Different solu-

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1/ [cont'd.]

this doctrine is appropriate for the present action, the court must look to the particular facts presented here. The California coastline is a unique and valuable resource of that state. In order to protect that resource, the people of that state enacted extensive legislation providing for a complex system of regulation with state controls ultimately yielding to local control with state supervision through the local adoption and state approval of local coastal plans . . . . [cont'd.]

tions necessarily are formulated by different jurisdictions to confront different problems:

> The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities.

Id. at 387. As long as a legislative determination is "fairly debatable, the legislative judgment should be allowed to control." Id. at 388.

In Gorieb v. Fox, 274 U.S. 603 (1927), this Court again upheld the constitutionality of a local zoning ordi-

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1/ [cont'd.]

> In view of the above, this Court feels constrained not to interfere with the local administration of local laws. In this manner, the state can be the determining agent of its own affairs and will be able to develop a coherent and cogent procedure in handling the cases arising under the coastal acts of the state.

Id. at 400.

nance, concluding:

> State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable.

Id. at 608.

Likewise, the Court sustained land use restrictions in Zahn v. Bd. of Public Works, 274 U.S. 325 (1927), stating that "the settled rule of this Court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question." Id. at 328. See Moore v. City of East Cleveland, 431 U.S. 494, 514 n.1 (1977) (Stevens, J. concurring: "The statement of the rule in Zahn remains viable today.").

The state's legislative declaration of the public interest is to be treated as "well-nigh conclusive." Berman v. Parker, 348 U.S. 28, 32 (1954).

More recently, in Village of Belle

Terre v. Boraas, 416 U.S. 1 (1974), the Court upheld an ordinance which limited the use of land to single-family dwellings, excluded all multiple dwellings, and narrowly defined "families." The Court reaffirmed its traditional attitude of refusing to "second guess" legislators and planners. The Court held:

> We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be "reasonable, not arbitrary" and bears "a rational relationship to a [permissible] state objective" . . . .
>
> [E]very line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative not a judicial function.

416 U.S. at 8 (emphasis added).

And, in Warth v. Seldin, 422 U.S. 490 (1975), this Court again observed that state and local governments should, whenever possible, be relied on to oversee land use regulation:

> We note that zoning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the

> province of state and local legislative authorities. They are, of course, subject to judicial review in a proper case. But citizens dissatisfied with provisions of such laws need not overlook the availability of the normal democratic process.

Id. at 508 n.18.[2/]

2/ In making decisions as to the location, amount, and type of new residential and commercial development, local governments must consider a wide variety of concerns -- ranging from long-range intangible values frequently asserted by environmental and social interests, to the immediate, hard dollar demands invoked by real estate development interests. When the ultimate balancing of the local governmental body is challenged by aggrieved property owners under the "taking" clause, no interest requiring special judicial protection is involved. Rather, the courts are being asked to upset a balancing involving complex economic factors typically asserted by competing interests within the real estate development community itself (e.g., should new residential subdivisions or shopping centers be allowed on the periphery of the community where they might siphon population and trade away from the downtown area and concurrently increase public infrastructure costs). The legislative and administrative halls, not the courts, are the appropriate forum for resolving such disputes among such powerful economic interests.

Also, in Village of Arlington Heights v. Metro Housing Corp., 429 U.S. 252 (1977), it was emphasized that legislative decisions were entitled to substantial deference by the judiciary:

> Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality.

Id. at 265 (emphasis added).

The Court's most recent and comprehensive discussion of land use regulation and "taking" is Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978). Most notably, this Court reaffirmed the traditional deference paid zoning regulation.

> More importantly for the present case, in instances in which a state tribunal reasonably concluded that "the health, safety, morals, or general welfare" would be promoted by prohibiting particular contem-

> plated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests. See Nectow v. Cambridge . . . . Zoning laws are, of course, the classic example, see Euclid . . . (prohibition of industrial use); Gorieb v. Fox . . . (requirement that portions of parcels be left unbuilt); Welch v. Swasey . . . (height restriction), which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property. See Goldblatt v. Hempstead, supra, at 592-93 . . . and cases cited; see also Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 674 n.8 . . . .

Id. at 125 (citations omitted).

Agins' amici cite dozens of scholars who have proposed complex schemes for recapturing the increases in land value resulting from government regulation, and using these funds to compensate losses caused by regulation.[3/] The proposals focus on political and fiscal problems and intricate valuation and remedial mechanisms which

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3/ E.g., D. Hagman & D. Misczynski, Windfalls for Wipeouts: Land Value Capture and Compensation (1978).

are most properly addressed by the state legislatures. Regardless of the argued desirability of any of these programs, few, if any, commentators realistically expect them to be implemented by the courts.

The California Supreme Court recognized this in HFH, Ltd. v. Superior Court, 15 Cal.3d 508, 542 P.2d 237, 125 Cal.Rptr. 365 (1975), where the court reviewed voluminous amici briefs urging the adoption of various remedial schemes to compensate "takings." The court concluded:

> We are urged in this case to redefine the state and federal constitutional requirements of just compensation and to require payment for any zoning action which results in the substantial diminution of market value. That we do not do so reflects less our belief that no problems exist with the present law in this area than our conviction that legislative rather than judicial action holds the key to any useful reform. The welter of proposals for action to remedy the inequities in the scheme of land use regulation which falls short of invoking constitutional protection bear ample witness to the ferment in this area. Without passing on the desirability or legality of any of the proposed plans, we note that

> almost without exception they require legislative action for their implementation. The complexity of the schemes proposed and the administrative machinery required for their effectuation obviously exceed anything readily feasible as a judicial remedy. Thus even if we were wholeheartedly to concede the wisdom of these plans, they would lie beyond our remedial powers.

15 Cal.3d at 521-22 (emphasis added) (citations omitted).[4/]

Many leading commentators have concluded that "reform" in this difficult

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4/ The HFH court quoted from Professor Michelman's leading article on just compensation, as follows:

> [T]he courts recognize that they cannot, through the enunciation of doctrine which decides cases, adequately stake out the limits of fair treatment; that if the quest for fairness is left to a series of occasional encounters between the courts and public administrators it can but partially be fulfilled; and that the political branches, accordingly, labor under their own obligations to avoid unfairness regardless of what the courts may require.

Id. at 522, citing Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1252 (1967).

area must come from the legislatures.

Professor Costonis concludes in his article, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 Colum. L. Rev. 1021, 1048-49 (1975):

> In the last analysis, it is the job of legislatures to hear the claims of competing groups and to accommodate their legitimate interests as fairly as possible within a normative framework understandable both to these groups and to reviewing courts. Ultimately, it is their job to take the leading role in forging a value consensus concerning entitlements of land ownership in 20th Century America. Their failure to get on with the job is the root cause of the nation's taking quandary.

See also Van Alstyne, Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria, 44 So. Cal. L. Rev. 1, 72-73 (1970); Van Alstyne, Statutory Modification of Inverse Condemnation: The Scope of the Police Power, 19 Stan. L. Rev. 727 (1967); Costonis, Development Rights Transfer: An Exploratory Essay, 83 Yale L. Rev. 75 (1973); Rose, A Proposal for the Separation and Marketability of Development

Rights as a Technique to Preserve Open Space, 2 Real Est. L. J. 635 (1974) (all proposing legislative action). See generally, F. Bosselman, D. Callies, J. Banta, The Taking Issue (1973).

The fundamental flaw in allowing inverse condemnation for mere governmental regulation is that courts cannot provide for any recapture of "windfalls" bestowed on landowners by regulations enhancing their property value. Of course, all zoning affects property values -- some parcel values are increased, others decreased. In general, however, zoning enhances the value of all land in the community. Requiring that municipalities compensate landowners whose property is decreased creates a lopsided scheme where the state "insures" landowners against losses from zoning regulations without receiving funds from benefitted landowners to finance the scheme.

C. The State's Decision on an Issue of Remedies for Improper Use of the "Police Power" Should Not Be Overturned Unless the Relief Is Inadequate to Protect Federal Constitutional Rights.

As noted, the instant case involves federal review of a state court decision in an area recognized to be of unique importance to states and localities. But it also calls into question the ability of the states to fashion different, but equally effective, remedies for the redress of federal constitutional rights in the state courts. In considering whether to require nationwide uniformity on the question of money damages as a universally available remedy, amici APA respectfully suggest that this Court consider the impact of such a decision on the institutional autonomy of the state legislative and judicial systems.

In considering claims which seek to "constitutionalize" particular remedies to redress loss of federal rights, this Court often considers the adequacy of

state remedies available.[5/] State-fashioned remedies have been ruled inadequate to protect federal rights only when such remedies were found to

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5/ See Stone v. Powell, 428 U.S. 465 (1976) (adequate opportunity for fair litigation of state prisoner's fourth amendment claim precludes federal habeus corpus relief); Paul v. Davis, 424 U.S. 693 (1976) (adequacy of state remedy considered in determining whether state-inflicted injury to a person's reputation violates 42 U.S.C. § 1983); Ingraham v. Wright, 430 U.S. 651 (1977) (denial of federal relief against corporal punishment based in part on fact that state's common law remedies proved sufficient to preserve "due process of law"). See also McCoy v. Shaw, 277 U.S. 302 (1928) (denial of relief based on state law of remedies upheld); Mellon Co. v. Charles McCafferty, 239 U.S. 134 (1915) (same). Cf. Miranda v. State of Arizona, 384 U.S. 436, 490 (1966) ("Congress and the states are free to develop their own safeguards for the privilege [against self incrimination] so long as they are fully as effective as those described above."); J.I. Case Co. v. Borak, 377 U.S. 426, 434 (1964) (inference of a private cause of action from a federal statute should be based in part on whether the cause of action is one traditionally relegated to the states, in a legal field that is basically their concern).

deny all meaningful relief to a plaintiff.[6/]

Nor should the property owners in the instant case be afforded a money damage remedy inferred by necessity from the federal constitution as in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). In Davis v. Passman, 99 S.Ct. 2264 (1979), the most recent case in which Bivens damages were allowed, this Court considered, inter alia, three primary factors as relevant to whether such damages were required: (1) For Davis as for Bivens, relief was "damages or nothing." Id. at 2277, citing Bivens, 403 U.S. at 410 (Harlan, J. concurring). As will be seen, the Aginses, in contrast, had other effective remedies available; (2) In Davis, deference to state court

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6/ E.g., Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule applied to states on the grounds that without it, the fourth amendment would be a mere "form of words"); Brinkerhoff-Faris Trust & Savings Co. v. Hill, 350 U.S. 91 (1930) (state law effectively left party without any remedy); Ward v. Bd. of County Comm'rs, 253 U.S. 17 (1920) (same).

adjudication did not "serve the purposes of federalism." Id. at 2277 n.23. As demonstrated in this section, land use control is almost exclusively a state and local governmental function, and the Agins case raises critical issues of federalism; (3) In Davis, relief in damages was "judicially manageable" and "without difficult questions of valuation." Id. at 2277. Of course, the valuation problems in inverse condemnation actions such as the instant case are not only formidable, but they are overwhelming.

D. California's Decision to Limit Landowners to Mandatory, Declaratory and Injunctive Relief in Its State Courts to Remedy Unconstitutional Zoning Ordinances Adequately Protects Federal Constitutional Rights.

Appellants here have not been denied the opportunity to obtain an effective, meaningful remedy for protecting their constitutional rights as they claim. The California Agins ruling simply limits appellants to mandatory, declaratory and injunctive relief to remedy any constitu-

tional violations perceived in the state local planning and zoning regulations as they might apply to appellants' property.[7] Such relief is not only effective; it is the traditional, and indeed only, remedy this Court has granted in cases of unconstitutional land use regulation. Nectow v. City of Cambridge, 277 U.S. 183 (1928); Pennsylvania Coal Co. v. Mahon,

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7/ Of course, prior to seeking judicial relief from the California courts, the Aginses here could have, but did not, seek legislative or administrative relief from the City. For example, they could have applied to the city council for a rezoning of their property, or, indeed, they could have sought to begin the administrative procedures necessary to entitle them to develop as many as five dwelling units on their five acres. Moreover, no attempt was apparently made by the Aginses to obtain a variance based on hardship or other special circumstances, or a conditional use permit or other exception to the zoning ordinance -- categories of administrative relief commonly granted in California by administrative bodies without need for city council approval. See D. Hagman, California Zoning Practice 258-312 (Calif. Cont. Educ. of the Bar 1975).

260 U.S. 393 (1922).[8]

The claim of appellants that meaningful equitable relief and "invalidation of regulations is virtually unobtainable" in California, Appellants' brief, at p. 44, is wholly without merit. For example, the California appellate courts have frequently invalidated arbitrary and discriminatory "spot-zonings" at the behest of aggrieved property owners. E.g., Hamer v. Town of Ross, 59 Cal.2d 776, 382 P.2d 375, 31 Cal.Rptr. 335 (1963); People ex rel. Dept. of Pub. Works v. Southern Pac. Transp. Co., 33 Cal.App.3d 960, 109 Cal.Rptr. 525 (1973). They will closely scrutinize and invalidate local zoning ordinances that have adverse "exclusionary" impacts upon regional housing patterns. Associated Home Builders v. City of Livermore, 18 Cal.3d 582, 557 P.2d 473, 135 Cal.Rptr. 41 (1976). Cf. G&D Holland Constr. Co. v. Marysville, 12 Cal.App.3d 989, 91 Cal.Rptr. 227 (1970). Similarly, they have often

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8/ See F. Bosselman, D. Callies, J. Banta, The Taking Issue (1973).

mandated that construction permits be granted by reluctant local authorities where property owners have obtained constitutional or statutory "vested" rights to build. E.g., Youngblood v. Bd. of Supervisors, 22 Cal.3d 644, 586 P.2d 586, 150 Cal.Rptr. 242 (1979); Roman Catholic Welfare Corp. v. Piedmont, 45 Cal.2d 325, 289 P.2d 438 (1955); Sunset View Cemetary Ass'n v. Kraintz, 196 Cal. App.2d 115, 16 Cal.Rptr. 317 (1961); McCombs v. Larson, 176 Cal.App.2d 105, 1 Cal.Rptr. 140 (1959); Munns v. Stenman, 152 Cal.App.2d 543, 314 P.2d 67 (1957); Woodie v. Byram, 132 Cal.App. 2d 651, 282 P.2d 920 (1955). Cf. Trans-Oceanic Oil Corp. v. Santa Barbara, 85 Cal.App.2d 776, 194 P.2d 148 (1948). Declaratory judgments and injunctions against the enforcement of local zoning laws unconstitutionally infringing on private property rights have also often been granted. Furey v. City of Sacramento, 24 Cal.3d 862, 598 P.2d 844, 157 Cal.Rptr. 684 (1979); San Diego Coast Regional Comm'n v. See the Sea, Ltd., 9 Cal.3d 888, 513 P.2d 129, 109 Cal.Rptr. 377 (1973); Kissenger v. Los Angeles,

161 Cal.App.2d 454, 327 P.2d 10 (1958); McCaslin v. Monterey Park, 163 Cal.App. 2d 339, 329 P.2d 552 (1958); Greenfield v. City Planning Comm'rs., 6 Cal.App.2d 515, 45 P.2d 219 (1935). And administrative mandamus is also available to test the constitutional validity of local land use controls. Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal.Rptr. 79 (1973).9/

9/ It is also noteworthy that California has developed extraordinarily speedy and efficient procedures for issuance of these remedies. For example, writs of mandate may be filed in any court, including the appellate courts themselves. Cal. Const. Art. VI, § 10. After filing a petition for the writ, the petitioner simply obtains an alternative writ which includes an order to show cause to the defendant entity. The hearing on the return to the writ serves as the trial. Cal. Code of Civil Procedure §§ 1087, 1088. See generally, 5 Witkin, California Procedure §§ 149, 164, 166, 168, 170 (2d ed. 1971). Many California trial courts have created special departments with specialized procedures whose sole purpose is to hear and determine applications for extraordinary relief, such as writs of mandate, and applications for preliminary injunctions. See e.g., Los [cont'd.]

Furey v. City of Sacramento, 24 Cal. 3d 862, 598 P.2d 844, 107 Cal.Rptr. 648 (1979), a post-Agins case, is particularly instructive. There landowners had paid over $1 million on special assessment bond obligations for sewer lines in anticipation of residential development. The city adopted an open space element to its general plan and amendments to its zoning ordinance placing four-fifths of the Fureys' land in an agricultural zone. The California Supreme Court denied money damages for the alleged "taking" (citing Agins), but held that the landowners were entitled to "declaratory relief or mandate precluding the application of the subject land use regulations to plaintiffs," id. at 877-78, if they established that the open space controls prevented them from realizing "the special benefits generated by the assessment district in which they

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9/ [cont'd.] Angeles County Superior Court, Manual of Policy and Procedure for the Writs and Receivers Department of the Superior Court for the County of Los Angeles (1975).

have substantially contributed." Id. at 877.

Furey shows that the California courts continue to be willing to invalidate unconstitutional ordinances as they apply to an individual landowner. The relief granted there was a flexible, carefully balanced order which alleviated the hardship to the plaintiffs while giving the defendant city an opportunity to avoid a costly "forced compensation." Such relief contrasts sharply with the rigid, all-or-nothing approach followed by courts in granting money damages.10/

10/ Compare Arastra Limited Partnership v. City of Palo Alto, 401 F.Supp. 962 (N.D. Cal. 1975), where, after judgment for plaintiffs on an inverse condemnation action, the city paid $7.5 million, the price Arastra originally paid for the property. Even Professor Hagman, an outspoken proponent of allowing certain types of money damages for certain "regulatory takings," acknowledges the extremity of this outcome: "By regulating for open space, the court held the city purchased the property in fee at its value assuming substantial development. While one wants to attract the city's attention by requiring compensation, there is no need to use [cont'd.]

Unlike inverse condemnation awards, the relief allowed in California gives legislatures an opportunity to weigh costs and benefits and to choose from a variety of options. The government may enact less severe zoning regulations, exercise eminent domain and acquire the property, combine regulation with compensation, or abandon its regulations entirely. Such careful balancing is obviously more properly done by the legislatures than by the courts.

10/ [cont'd.] a bat that knocks the city out." D. Hagman & D. Misczynski, Windfalls for Wipeouts: Land Value Capture and Compensation 303 (1978).

II. THE CALIFORNIA LEGISLATURE HAS ENACTED STATUTORY REFORMS IN THE PLANNING AND ZONING FIELD TAILORED TO CALIFORNIA'S CIRCUMSTANCES -- THE COURTS SHOULD BE SUPPORTIVE OF THESE EFFORTS TO PROMOTE THE DEVELOPMENT AND IMPLEMENTATION OF RATIONAL AND FAIR COMPREHENSIVE PLANS, AND SHOULD NOT CREATE NOVEL AND UNNECESSARY CONSTITUTIONAL REMEDIES WHICH UNDERMINE COMPREHENSIVE PLANNING.

A. Early Zoning Practice in California.

California has long been at the forefront of the nation in fostering sound local government planning and zoning techniques. Local zoning existed in California as early as 1885. See In re Hang Kie, 69 Cal. 149, 10 P. 327 (1886). Los Angeles became the most fully zoned city in the United States between 1904 and 1915. D. Hagman, California Zoning Practice 4 (Calif. Cont. Educ. of the Bar 1969). In 1917, the California Legislature enacted the state's first zoning act, making California one of the first states to have such legislation. Id.11/

11/ California's basic zoning legislation differs in many pertinent [cont'd.]

In 1925, the California Supreme Court rendered its landmark decision in Miller v. Board of Public Works, 195 Cal. 497, 234 P. 381 (1925). There, the California Court upheld the overall constitutionality of local zoning in a manner almost identical to that taken by this Court two years later in Village of Euclid v. Ambler Realty Co.:

> [T]he police power is not a circumscribed prerogative, but is elastic and in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life and thereby keep pace with the social, economic, moral, and intellectual evolution of the human race.
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> * * *
>
> The increase of our urban population makes regulation necessary. As the congestion of our cities increases, likewise do the problems of traffic control and police, fire, and health protection. Comprehensive and systematic zoning is the successful solution of these problems and obviously tends thereby to affirmatively promote the public welfare.
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> Every intendment is to be indulged by the courts in favor of the validity of its exercise, and unless the measure is clearly oppressive it will be deemed to be within the purview of that power. It is only when it is palpable that the measure in controversy has no real or substantial relation to the public health, safety, morals, or general welfare that it will be nullified by the courts. The courts may differ with the legislature as to the wisdom and propriety of a particular enactment as a means of accomplishing a particular end, but as long as there are considerations of public health, safety, morals, or general welfare which the legislative body may have had in mind, which have justified the regulation, it must be assumed by the court that the legislative body had those considerations in mind and that those considerations did justify the regulation.

195 Cal. at 485, 489, 490.

During the ensuing fifty years, when this Court uniformly refused to review state zoning cases, the California appellate courts considered many cases involving the constitutionality of a wide array of so-called "downzonings" attacked by affected property owners.

11/ [cont'd.] respects from most state zoning enabling acts. See D. Hagman, California Zoning Practice 5 (Calif. Cont. Educ. of the Bar 1969).

Usually[12] but not always[13] the local government's exercise of the police power in the zoning context has been

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12/ E.g., Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal.2d 515, 370 P.2d 342, 20 Cal.Rptr. 638, appeal dismissed, 371 U.S. 36 (1962) (private property zoned to exclude quarrying which was only profitable use that could be made of the property); McCarthy v. City of Manhattan Beach, 41 Cal.2d 879, 264 P.2d 932 (1953) (private beachfront property zoned commercial "beach recreational" with only permitted structures being a small fence and a life guard tower); Turner v. County of Del Norte, 24 Cal.App.3d 311, 101 Cal. Rptr. 93 (1972) (open space flood plain zoning); Morse v. County of San Luis Obispo, 247 Cal.App.2d 600, 55 Cal.Rptr. 710 (1967) (private property downzoned to one dwelling unit per five acres); Metro Realty v. County of El Dorado, 222 Cal.App.2d 508, 35 Cal.Rptr. 480 (1963) (interim zoning ordinance restricting development within potential development sites).

13/ E.g., Peacock v. County of Sacramento, 271 Cal.App.2d 845, 77 Cal.Rptr. 391 (1969) (ordinance preventing building or even agricultural use of land for over five years required compensation); Sneed v. County of Riverside, 218 Cal. App.2d 205, 32 Cal.Rptr. 318 (1963) (airplane flight easement required compensation). See also cases cited, supra, at pp. 29 to 31.

upheld.

More recently, the California appellate courts have been confronted with legal issues relating to the constitutionality of actions taken by local authorities pursuant to new statutory local planning and zoning requirements. Because these statutory reforms constitute the basic legislative framework under which the City of Tiburon was functioning when it rezoned the Agins property here, it is important to understand the background leading to their enactment.

B. Legislative Reforms in Local Planning and Zoning Practices: the Mandate That Rational and Fair Comprehensive Local Land Use Plans Be Developed and Implemented.

Although local zoning was initially designed to be comprehensive in nature, as time passed and practice developed, most cities and counties throughout the nation failed to associate subsequent rezonings with comprehensive planning policies.

> Local planning commissions and city councils regularly changed zoning maps giving little thought to transportation policy, growth projections, capital improvement programs or any of the issues central to a modern general plan. The results of such ad hoc practices were inconsistent and unfair zoning decisions which bore little relation to serious planning.

Int'l City Mgmt. Ass'n, The Practice of Local Government Planning (So, Stollman, Beal and Arnold eds. 1979) at 419 [hereinafter The Practice of Local Government Planning].

But increasingly, through the 1970s, state legislatures and courts began to perceive that these sorts of local practices could lead to abuses, and thus sought to impose requirements for a greater measure of reason and fairness on the local land use decision-making process. In so doing, they repeatedly turned to the local general plan as the fundamental building block for a rational and fair system of land use control.

The highly influential International City Management Association summarized these important national legis-

lative and judicial trends in its landmark work, The Practice of Local Government Planning:

> In the 1970s a variety of forces combined to breathe new life into the idea of the city plan.
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> * * *
>
> This is a fairly recent phenomenon that has resulted from states mandating their local governments to plan, or courts insisting that some form of planning document be presented as the basis for land use controls.
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> This trend toward the required plan gained considerable momentum during the decade of the 1970s and promises to have a profound and lasting effect on our views of planning and plans. The trend reflects, more than anything else, a coming of age of planning and a recognition that a plan can and should really mean something. It reflects a change in attitudes toward the plan. The plan is no longer a formality, to be prepared and forgotten. It is rapidly becoming a requirement -- and one that must contain certain elements . . . .
>
> This trend appears to result primarily from a shifting attitude on the part of the courts as they review land use regulations . . . .
>
> Two major changes have occurred in land use control practices which have eroded the willingness of the courts to accept a zoning ordinance without reference to a city plan. The first change was the increasing use of flexible land use con-

trols. . . . The zoning ordinance was no longer prescriptive on its face but was merely a set of procedures one had to go through to find out what might be done with one's property. It was a system that could be subject to abuse.

The second change in land use control practice has been the increasing adoption of growth management programs . . . . Now that land use control has become a finely tuned flexible tool for controlling the most minute detail of development, including timing, a plan has become increasingly more important.

[A]s the status of the plan changes increasingly toward that of the impermanent constitution, it will become more important, it will be taken more seriously, and it will have a greater effect on people's lives.

Id. at 169-72.

Thus, throughout the 1970s, many state legislatures strengthened the relationship between zoning and the local comprehensive plan -- mandating that there must now be "consistency" between the comprehensive plan and subsequent rezonings.[14/]

14/ Currently, there are 18 states that have some form of required consistency between zoning and comprehen- [cont'd.]

Indeed, even where state legislatures did not expressly enact such "consistency requirements," state courts themselves judicially imposed "consistency requirement" standards.[15/] See generally J.F.

14/ [cont'd.] sive local plans. E.g., Alaska Stats. § 29.33.070 (1978 Supp.); Del. Code Ann. 9 § 6802,22 §701 (1978 Supp.); D.C. Code § 1-1002(a) (1978 Supp.); Fla. Stat. Ann. § 163.3161-3211 (Harrison 1978); Hawaii Rev. Stat. §226-1 (1978 Supp.); Idaho Code Ann. §§ 67-6501 (1979 Supp.); Ind. Ann. Stat. Code §§ 18-7-2-1, 18-7-5-1; Ky. Rev. Stat. Ann. §§ 100.137, 100.213; Me. Rev. Stat. Ann. §§ 4511, 4961 (1978); N.J. Stat. Ann. §§ 40:55D-23, 40:55D-62(a) (West Supp. 1977); Neb. Rev. Stat. §§ 19-901, 23-114.03 (1977); Ore. Rev. Stat. §§ 227.020, 215.020, 197.175; S.D. Compiled Laws, §§ 11-6-3, -14, 1122 (1978 Supp.)

15/ E.g., Baker v. City of Milwaukee, 533 P.2d 772 (Wash. 1975); Palazzi v. State, 319 A.2d 658 (R.I. 1974); Fasano v. Bd. of County Comm'rs of Washington County, 264 Ore. 574, 507 P.2d 23 (1973). See also Dalton v. City and County of Honolulu, 51 Hawaii 400, 462 P.2d 199 (1969); South of Sunnyside Neighborhood League v. Bd. of Comm'rs, 280 Ore. 3, 569 P.2d 1063 (1977); Hines v. Pinchback-Halloran Volkswagon, Inc., 513 S.W.2d 492 (Ky. 1974). Cf., Udell v. Haas, 21 N.Y.2d 463, 288 N.Y.S.2d 888 (1968).

DiMento, Improving Development Control Through Planning: The Consistency Doctrine, 5 Colum. J. Envt'l L. 1 (1978); Mandelker, The Role of the Local Comprehensive Plan in Land Use Regulation, 74 Mich. L. Rev. 899 (1976); Sullivan & Kressel, Twenty Years After -- Renewed Significance of the Comprehensive Plan Requirement, 9 Urb. L. Ann. 69 (1975); Note, Urban Planning and Land Use Regulation: The Need for Consistency, 14 Wake Forest L. Rev. 81 (1978); The Practice of Local Government Planning, supra, at 171, 419.

In California, problems of a like nature developed in the practice of local government planning and zoning, and the California Legislature responded with comparable statutory reforms. In 1968, for example, the State Office of Planning reported in its State Development Plan Program, at 259-60, that:

> Although preparation of a General Plan is required by law, only about two-thirds of the cities of the state have adopted one. The plans exhibit major gaps in responding to primary development policy needs . . . . A substantial number of cities still use zoning

> as completely unrelated to long-range planning objectives.
>
> Probably less than 20 percent of all counties in the state can be considered to have thoroughly prepared, up-to-date, effective general plans.

Two years later, the California Legislature's Joint Committee on Open Space Lands undertook an extensive survey of local government planning efforts and concluded that "most local plans are development oriented. Planning for urban expansion frequently dominates planning for open space preservation." Cal. Joint Comm. on Open Space Lands, Final Report (1970) at 23-24. Moreover, the prevailing practice among local agencies was to develop "two parallel plans" -- one the official general plan and the other the "de facto" plan drawn by the local body as it administers zoning and other land use programs." Id. at 24. According to the Final Report, this "dichotomy" between the official general plan and the implementing measures theoretically designed to carry it out should be ended. There should be "unity" between the official plan and the de facto implementing plan.

Id. "The best plan poorly followed can be of little value . . . . Until local actions are required to comply with the appropriate local plan, the danger of thwarting planning goals will continue . . . ." Id.

Consequently, the California Legislature enacted new legislation in 1970 amending the Planning and Zoning Law to require that local governments incorporate extensive open space planning elements into the local general plan, Cal. Gov't. Code §§ 65560-65565 (West 1980).16/ Moreover, for the first

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16/ Article 10.5 of the California Government Code entitled "Open-Space Lands" (Cal. Gov't. Code §§ 65560-65570 (West 1980)) was adopted by the California Legislature "to assure that every city and county will prepare and carry out open-space plans which, along with state and regional open-space plans, will accomplish the objectives of a comprehensive open-space program." Id. § 65562(b).

The preservation of open space land was found necessary "not only for the maintenance of the economy of the state, but also for the assurance of the continued availability of land for the production of food and fiber, for the enjoyment of scenic beauty, for recreation and for the use of natural [cont'd.]

time, the Legislature mandated that such future land use decisions as zoning and subdivision map approvals must be "consistent with" those open space elements. Id. §§ 65566, 65567, 65910. This new "consistency requirement" was extended a year later to ensure that henceforth all zoning and subdivision map approvals must be "consistent with" the entire general plan. Id. §§ 65860(a), 66451,

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16/ [cont'd.] sources." Id. § 65561(a). The open space lands protected by the article include, inter alia, sensitive natural resources including areas required for the preservation of plant and animal life; open space for the managed production of resources including "forest lands, rangeland, agricultural lands and areas of economic importance for the production of food or fiber"; areas required for recharge of ground water basins, areas important to the management of commercial fisheries, and areas containing major mineral deposits; open space for public health and safety, including areas which require special management or regulation because of hazardous or special conditions such as earthquake fault zones, unstable soil areas, flood plains, watersheds, areas presenting high fire risks, and areas required for the protection and enhancement of air quality. Id. § 65560.

66474.)[17]

More recently, the California Legislature unequivocally declared:

> Decisions involving the future growth of the state, most of which are made and will continue to be made at the local level, should be guided by an effective planning process, including the local general plan, and should proceed within the framework of officially approved statewide goals and policies directed to land use, population growth and distribution, development, open space, resource preservation and utilization, air and water quality, and other related physical, social and economic development factors.

Id. § 65030.1.[18]

17/ The California Legislature's Joint Assembly Subcommittee on Premature Subdivisions stated in its 1971 Staff Recommendations for Legislative Action, at 3: "At present, local zoning ordinances are not required to be consistent with city and county general plans. . . . [I]t is neither wise nor reasonable to permit this type of land use policy to continue any longer."

18/ The California statute also requires that, in implementing their general plans, local agencies must consider "the housing needs of the region" and balance these against "the public service needs of its residents and available fiscal and environmental [cont'd.]

C. California Court Response to the New Planning and Zoning Statutory Reforms -- The Constitutionality of Local Government Action Taken Pursuant to These Mandates.

When confronted for the first time with a constitutional challenge to local government action implementing the planning and zoning requirements imposed

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18/ [cont'd.] resources." Id. §§ 65863.5, 66412.2. Further, since 1965, it has been required that all cities and counties include a housing element in their comprehensive, local general plan which makes "adequate provision for the housing needs of all economic segments of the community." Cal. Gov't. Code § 65302(c) (West 1980) (emphasis added). This element must contain "standards and plans for the improvement of housing" and must provide adequate sites for housing. The Housing Element Guidelines promulgated by the California Department of Housing and Community Development (HCD), define the "community" to be encompassed by the local housing element to include "a fair share of those market area households . . . who would live within the local jurisdiction were a variety and choice of housing appropriate to their needs available." Cal. Admin. Code, tit. 25, § 6418 (West 1980). The HCD Guidelines' emphasis on a regional "fair share" approach to housing essentially codifies the landmark case of Southern Burlington [cont'd.]

on local governments by these statutory reforms, the California Supreme Court observed:

> The elimination of open space in California is a melancholy aspect of the unprecedented population increase which has characterized our state in the last few decades . . . . These factors have been recognized by the recent adoption of Article XXVIII of the Constitution, which provides that it is in the best interest of the state to maintain and preserve open space lands to assure the enjoyment of natural resources and scenic beauty for the economic and social well-being of the state and its citizens. Statutes which further the underlying policy expressed in the constitutional section must be upheld whenever possible in order to effectuate its salutary purposes.

Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek, 4 Cal.3d 633, 638-39, 484 P.2d 606, 94 Cal. Rptr. 630 (1971).[19]

Two years later, the California Supreme Court stated: "The deleterious consequences of haphazard community

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18/ [cont'd.] County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, cert. denied, 423 U.S. 808 (1975) (invalidating zoning ordinance which discriminated against low and moderate cost housing).

In Associated Home Builders v. City of Livermore, 18 Cal.3d 582, 557 P.2d 473, 135 Cal.Rptr. 41 (1976), the California Supreme Court held that local zoning practices which have "exclusionary" effects on housing within a region are subject to judicial review in California to ensure that they are consistent with the overall general welfare within the region. Although appellants and their amici darkly hint in their briefs that the Tiburon zoning ordinance has "exclusionary" impacts on lower-income families, it is noteworthy that these arguments were not made to the California state courts despite the California Supreme Court's ruling that they would actively entertain such claims.

19/ See also State of California v. Superior Court (Veta), 12 Cal.3d 237, 524 P.2d 1281, 115 Cal.Rptr. 497 (1974) (upholding constitutionality of California Coastal Commission); People ex rel. Younger v. County of El Dorado, 5 Cal.3d 480, 487 P.2d 1193, 96 Cal.Rptr. 553 (1971) (upholding constitutionality of Lake Tahoe regional planning agency); Candlestick Properties, Inc. v. San Francisco Bay Conservation and Development Comm'n., 11 Cal.App.3d 557, 89 Cal. Rptr. 897 (1970) (upholding constitutionality of regional planning agency for San Francisco Bay).

growth in this state and the need to prevent further random development are evident to even the most casual observer. The Legislature has attempted to alleviate the problem by authorizing the adoption of long-range plans for orderly progress." Selby Realty Co. v. City of San Buenaventura, 10 Cal.3d 110, 121, 514 P.2d 111, 109 Cal.Rptr. 799 (1973). According to Selby, the threat of inverse condemnation actions brought against local governments by aggrieved property owners who challenged the general plan's application to their parcels could bring about a situation where "the process of community planning would either grind to a halt, or deteriorate to publication of vacuous generalizations regarding the future use of land." Id.

Similarly, in HFH, Ltd. v. Superior Court of Los Angeles County, 15 Cal.3d 508, 542 P.2d 237, 125 Cal.Rptr. 365 (1975), the California Supreme Court faced a constitutional challenge to another local government action. There, a city had recently adopted a newly

revised comprehensive general plan pursuant to the statutory scheme described, indicating low-density residential uses for the parcel in question. The plaintiffs property owners sold the parcel to a buyer wishing to make commercial use of the property and sought a rezoning for commercial uses. Instead, the city rezoned the parcel from agricultural to low-density residential uses. In writing what to date has been the leading California Supreme Court decision on the issue, Mr. Justice Tobriner noted that, in past zoning cases, mandamus setting aside an unconstitutional rezoning had been the remedy traditionally sought and, in appropriate cases, given. Money damages had never been considered an appropriate remedy. 15 Cal.3d at 512, 520, 523.20/ His

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20/ Appellants and their amici characterize California's HFH and Agins opinions as mavericks, out of step with the rest of the state courts in the country. In fact, many jurisdictions have adopted positions similar to California's on the issue of money damages for allegedly "confiscatory" land use regulation, including: [cont'd.]

opinion cogently describes the reciprocal benefits and burdens achieved by comprehensive planning and zoning, and the potential mischief that such money damage awards posed:

> In this case, as in most instances, zoning is not an arbitrary action depriving someone of property for the purpose of its use by the public or transfer to another; rather it involves reciprocal benefits and burdens which the circumstances of this case well illustrate. The shopping center which plaintiffs seem at various times to have contemplated erecting, would derive its value from the existence of residential housing in the surrounding area. That residential character of the neighborhood, we may assume, results in part from the residential zoning of the area around the tract in question. Plaintiffs in this case

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20/ [cont'd.] Cardon Oil Co. v. City of Phoenix, 122 Ariz. 102, 593 P.2d 656 (Ariz. 1979); Eck v. City of Bismarck, 283 N.W.2d 193 (N.D. 1979); Davis v. Pima County, 121 Ariz. 343, 590 P.2d 459 (Ariz.App. 1978); Fred R. French Inv. Co., Inc. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381 (1976); Gold Run, Ltd. v. Bd. of County Comm'rs, 554 P.2d 317 (Colo.App. 1976); Mailman Development Corp. v. City of Hollywood, 286 So.2d 614 (Fla.App. 1973).

> therefore find themselves in a somewhat uncomfortable position: they wish to reap the benefit in the form of higher market values of their land, of the restrictive zoning on other properties, but do not wish to bear the reciprocal burden of such zoning when it applies to their property. They thus would avoid the enforcement of residential zoning on their property while benefiting from its enforceability as to other property.
>
> The long settled state of zoning law renders the possibility of change in zoning clearly foreseeable to land speculators and other purchasers of property, who discount their estimate of its value by the probability of such change.

Id. at 521-22.21/

21/ Similarly, in Carty v. City of Ojai, 77 Cal.App.3d 329, 143 Cal.Rptr. 506 (1978), the Court of Appeals faced a situation where certain property at the outskirts of a small city had been annexed by it and zoned for commercial shopping center purposes. Three years later, the city employed professional planning consultants who prepared a study recommending that further commercial development outside the downtown business district be curbed, and that the downtown area be redeveloped. The city amended its plan to incorporate the recommendations of the report, and subsequently "downzoned" plaintiffs' property to allow continued [cont'd.]

And, in the instant case, the California Supreme Court again very properly considered the plaintiff property owners' constitutional claim for inverse condemnation money damages in the context of the California State Legislature's statutory planning and zoning reforms. "Tiburon, like every other city in California, is required by state law to prepare a general plan . . . . Routinely, the development of a general plan entails a careful examination of numerous social and economic

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21/ [cont'd.] commercial uses, but to preclude development of shopping centers. The court rejected the property owners' claim that the downzoning was unconstitutional, observing that the downzoning had to be viewed in the "contextual setting" of the implementation by the city of its general plan. 77 Cal.App.3d at 338. Many state courts from other jursidictions have recently upheld the constitutionality of similar downzonings designed to implement comprehensive plan policies. E.g., Montgomery County Council v. Dist. Land Corp., 274 Md. 691, 337 A.2d 712 (1975); Horizon Adirondack Corp. v. State, 88 Misc.2d 619, 388 N.Y.S.2d 235 (Ct.Cl. 1976); Culver v. Dagg, 20 Or.App. 647, 532 P.2d 1127 (1975).

factors." 24 Cal.3d at 270.

A suburb of San Francisco with a population of about 6,000 persons and an area of 1,676 acres, the City of Tiburon had carefully prepared, with the assistance of planning experts, a comprehensive general plan pursuant to these state laws. Id. at 270-71. The plaintiffs' parcel (located on the ridge land overlooking San Francisco Bay) was rezoned in accord with this plan to allow residential development at a density range between one unit per acre and five units per acre, depending on the results of more detailed planning studies which would be performed when and if the property owners applied for developmental permits. Id. at 271. Without applying for any developmental permits under this zoning ordinance, and indeed without seeking to change the zoning classification, plaintiffs thereupon filed an inverse condemnation claim for $2 million, arguing that their property had thereby been "taken" without just compensation.

Mr. Justice Richardson's Agins opinion follows the theme of previous

opinions: "Community planners must be permitted the flexibility which their work requires." Id. at 275. Court authorization of an inverse condemnation remedy for money damages would have a "chilling effect" upon the exercise of local police regulatory powers "because the expenditure of public funds would be, to some extent, within the power of the judiciary." Id. at 276. The "threat of unanticipated financial liability" will inevitably intimidate local legislative bodies into adopting meaningless planning and zoning regulations which are "fiscally safe." Id. It would be a "usurpation of legislative power" for the courts to "force compensation." Id. "Invalidation, rather than forced compensation, would be the more expedient means of remedying legislative excess." Id. "In combination, the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy, persuade us that on balance mandamus or declaratory relief rather than inverse condemnation is the appro-

priate relief under the circumstances." Id. at 276-77.

D. The Practical Implications on Comprehensive Local Planning and Zoning Occasioned by an Inverse Condemnation Remedy for Diminution in Value Resulting from Exercise of the Police Power.

The foregoing discussion has shown that California, like many states recently, has attempted to provide greater protection to the interests of property owners and the community at large by requiring preparation of comprehensive general plans and by requiring that individual zoning and other land use decisions be consistent with those plans. As an indication of the importance attached to this statutory scheme, it is noteworthy that California's cities and counties have spent many millions of dollars in preparing these revised and updated general plans and bringing their zoning into conformity with them.[22/] California obviously

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22/ A sampling of city and [cont'd.]

believes that this substantial financial investment in sound planning will reap substantial economic dividends from both an efficiency and equity standpoint. The California system is efficient because it promotes more rational land use management and allows coordination of local government capital investment policy with police power regulatory authority.[23/] It is equitable because

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22/ [cont'd.] county expenditures on advance planning for fiscal year 1977-78 shows: Los Angeles County $2,181,890; San Francisco City and County $514,644; San Diego County $2,066,608; Santa Clara County $688,163; Los Angeles City $1,557,921. Local Government Planning Survey, 1978 -- State of California (Governor's Office of Planning and Research, 1980). California has several hundred cities and many dozens of counties, so these figures give only an indication of the magnitude of the total dollar expenditure by local governments for these purposes.

23/ A local government obviously affects private land values through the pattern of its capital investments in public infrastructure. In some instances, the value of private lands are increased by these capital improvements (e.g., lands located adjacent to a new freeway off-ramp) while in [cont'd.]

it brings greater fairness to affected property owners and to the community at large when their competing needs (property owner vs. property owner; property owner vs. community) are balanced in the context of comprehensive planning, rather than ad hoc decisionmaking at the behest of a favored few. Ultimately, this increased rationality and fairness also brings about a further efficiency -- the need for fewer lawsuits by property owners, neighbors or other groups who feel their interests have been insufficiently considered by the decision-

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23/ [cont'd.] others, they are decreased (e.g., lands located near a new sewer treatment facility). It is difficult to see how property owners who are adversely affected by such capital expenditures can claim that the resulting indirect decline in value of their lands has resulted in a "taking" of their private property rights. Yet a decision allowing an inverse condemnation remedy for comparable declines in value resulting from police power regulatory actions would effectively prevent local governments from coordinating their police power regulations with their capital improvements projects (a common and desirable current practice) in order to provide compatible land use activities.

makers.

The potential "chilling effect" on this "preventative medicine" system posed by the spector of enormous money damage awards to aggrieved property owners bringing inverse condemnation suits is a very real and compelling one. The California Supreme Court has correctly observed that the threat of such damage actions could easily render this entire statutory scheme into a mere "paper tiger."

Nowadays, local general plans are often based on complex population forecasting techniques; they attempt to influence and direct predicted urban growth toward areas most suitable for urban expansion (e.g., toward existing infrastructure) and away from hazardous sites or sites containing significant natural resources. Yet previous zoning patterns in many cities date back to the days of "boosterism" and provide urban zoning for populations far in excess of any reasonable current estimates of future growth -- often in sites that current planning concepts consider highly undesirable for urban activities.

Such "overzoning" and wrong-site zoning exists in most California cities and counties.[24/] Consequently, many California property owners will be substantially affected by future zoning rollbacks necessitated by contemporary planning techniques and the state-mandated consistency requirement.

Moreover, the amounts of money each such affected property owner may claim as his diminution in value resulting from these zoning rollbacks can reach enormous magnitudes. Land and housing prices

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24/ For example, in the City of Los Angeles, the proposed general plan projects a growth from 3,025,151 persons in 1977 to 3,191,098 persons in the year 2000 based on current population trends. The general plan is designed to provide sites for 3,996,400 persons in 2000 -- about five times the capacity required to house the projected population growth. Current zoning capacity within the City, however, already provides sites for fully 6,274,700 persons. City of Los Angeles, Housing Element of the General Plan, p. 40 (Oct. 31, 1979). As a result, the City must necessarily undertake extensive "downzoning" activities to bring its zoning into the required "consistency" with the local general plan. Id. at 42.

have risen at enormous rates in California during the past five years.[25/]

Further, recent experience in California has shown the potentially disastrous effects on property and lives resulting from previous land use patterns and practices allowing extensive development of hazardous areas such as flood plains, seismic hazard lands, unstable hillside slopes and the like. It would be anomalous for local governments to be forced to compensate California property owners for diminutions in value to their lands occasioned by severe restrictions imposed to save the very lives and property of these same property owners. Yet even the prospect of large, unexpected damage awards based on such severe land use restrictions

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25/ The average sale price for an existing detached single-family home in Los Angeles County, for example, doubled between 1974 and 1978, while the average price for new homes went even higher. These prices were almost double the national average in major metropolitan areas. Los Angeles County Regional Planning Department, Proposed General Plan, p. IV-19 (Oct. 1978).

going "too far" may otherwise intimidate local planners into adopting meaningless regulations and abdicating their responsibility to prevent such harms.

Finally, this "chilling effect" may affect many other activities of police power regulation besides land use control activities. For example, in Dana Corp. v. State of California, 80 Daily Journal D.A.R. 743 (Cal. Ct. of Appeal, Second App. Dist., 2 Civ. No. 55838) (filed Mar. 13, 1980), the plaintiff property owner sought money damages on an inverse condemnation theory where the California Legislature had repealed certain legislation regulating the emission of oxides of nitrogen (NO_x) from automobiles and requiring the installation of devices designed to accomplish that end. Relying on the previous statute and the board's general solicitation of manufacturers, the plaintiff had invested substantial sums in developing and producing the devices. The Court of Appeal summarized the difficulty with plaintiff's contentions as follows:

> All that plaintiffs have alleged, or could allege, is that the Legis-

lature, in 1971, thought that requiring NOx devices on old cars was desirable and that, by 1974, the then Legislature thought that such a requirement was not desirable. A Legislature is not liable, nor is the state liable, for a change in its perception of public interest. Many things once thought desirable, or even to be encouraged, are later thought to be undesirable and to be discouraged. An investment under the earlier legislation is not protected against a change in the Legislature's views of desirability.

No matter under what ingenious theory put forth, the case at bench falls squarely within an express governmental immunity. Sections 818.2 and 821 of the Government Code read as follows:

"A public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law.

"A public employee is not liable for an injury caused by his adoption of or failure to adopt an enactment or by his failure to enforce an enactment."

Id. at 743. See also HFH, Ltd. v. Superior Court of Los Angeles County, supra, 15 Cal.3d at 519-21; Andrus v. Allard, 100 S.Ct. 318 (1979) (collecting federal cases).

CONCLUSION

Writing for the California Supreme Court in HFH, Ltd. v. Superior Court, supra, Mr. Justice Tobriner aptly summarized the unsympathetic and unsound legal position argued by the plaintiffs here in seeking inverse condemnation money damages for a mere diminution in value of their land resulting from the local government's exercise of the police power:

> Plaintiffs in this case desire a change in long standing principles of the law of just compensation; they ask that we hold municipal zoning bodies liable for full compensation for any fall in market price due to zoning actions. Yet plaintiffs can cite no case and little by way of other considerations to support their claim of entitlement to compensation by reason of a change in zoning. Hoping to build a shopping center, they purchased a tract previously zoned as agricultural land. For reasons which do not appear in the record, they did not build for five years, although no zoning impediments are alleged to have existed. Now they desire to sell that land at a profit to yet another developer and complain that the city has in the meantime concluded that its interests would best be served

> by residential rather than commercial development of the tract in question. Unable to make the desired profit from the sale of their land, they now seek to recoup it from the city; in so doing they mistake the law.

15 Cal.3d at 522.

Amici submit that appellants' reiteration of this same argument here should be emphatically rejected by this honorable Court.

Dated: March 21, 1980.

Respectfully submitted,

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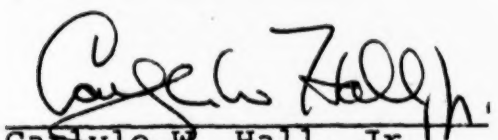
By 
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FOR ARGUMENT

Supreme Court, U.S.
FILED
MAR 24 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,
Appellants,

—VS.—

CITY OF TIBURON,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF *AMICUS CURIAE* ON BEHALF OF THE COMMITTEE ON ENVIRONMENTAL LAW OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

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Appellee.

BRIEF *AMICUS CURIAE* ON BEHALF OF THE COMMITTEE ON ENVIRONMENTAL LAW OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

This Brief *amicus curiae* on the merits of this appeal is filed by the Committee on Environmental Law of the Association of the Bar of the City of New York pursuant to Rule 42 of the Rules of the United States Supreme Court. Both appellants and appellee have consented to the filing of this brief and copies of their consents have been filed with the Clerk of this Court.

Interests of *Amicus Curiae*

The Association of the Bar of the City of New York ("The Association") has a membership of 11,766 attorneys admitted to practice in New York and elsewhere. The Association was established by Act of the New York State

Legislature in 1871. Laws 1871, Chapter 819; Amended Laws 1924, Chapter 134. Its stated statutory purposes are "cultivating the science of jurisprudence, promoting reforms in the law, facilitating the administration of justice, elevating the standard of integrity, honor and courtesy in the legal profession and cherishing the spirit of brotherhood among the members thereof."

Much of The Association's membership serves on specialized committees which are designed to make professional contributions in their special fields in furtherance of The Association's purposes. The Association's Committee on Environmental Law ("Committee") has examined the issue on appeal herein; it requested and unanimously approved the preparation of this brief *amicus curiae*. The Committee is composed of eighteen attorneys with extensive experience in environmental law and land-use gained through serving in local, state and federal governments, representing corporations, real estate development interests, environmental citizen organizations, and a range of other interests. The Executive Committee of The Association has authorized the filing of this brief on behalf of The Committee.

The Committee is concerned that the severe, narrow view advanced by appellants here, that each land-use regulation which exceeds constitutional limits creates a cause of action for damages, if adopted, would seriously inhibit land-use regulation in New York and nationally. We maintain that current legal practice in this sensitive area has struck a reasonable balance between the need to protect owners' interests and the need to safeguard the community from abusive land-use which ultimately erodes those property values. This is a responsibilty as time-honored as the common law of nuisance from which it stems. This balance is in conformity with the Constitution and has proven to be equitable. The predictability of the law is relied upon by municipalities, real estate developers

and environmental protection interests. To impose the threat of huge damages on municipalities would chill the exercise of their responsibility in this vital area of land-use regulation. There is no sound reason for reversing the decision of the California Supreme Court below. The administration of land-use laws in New York and elsewhere, as well as the economy, would be disrupted by a contrary decision which would throw the law into turmoil.

ARGUMENT

POINT I

Dismissal Was Warranted And No Trial Is Needed On The Issue Of Damages Because The State Court Properly Ruled That There Was No Taking.

The apparent linchpin of appellants' claim is their conclusory allegation that the ordinance "has completely destroyed the value of Plaintiffs' property for any purpose whatsoever . . ." (Complaint, ¶ IX). That allegation ignored the fact that appellants were free, under the very ordinance they attack, to construct five single-family residences on their five-acre tract. Accordingly, the California courts correctly found that they were not deprived of the reasonable use of their property. Thus, the state courts found that there was no cause of action for damages to be tried because there was no taking but merely an exercise of the State's police power.

Since on its face appellants' complaint failed to assert the sort of invasion or severe deprivation of all reasonable use which alone might support a taking claim, there is no issue of fact to try.

Portsmouth Harbor L. & H. Co. v. United States, 260 U.S. 327, on which appellants rely, dealt with a private

resort hotel made totally unusable by naval artillery shells being fired directly over it—a classic taking, in contrast to the zoning regulation at bar which does no more than reduce somewhat the value of appellants' tract. To rule that a compensable taking would undo *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, and five decades of municipal land-use controls since, leaving the law in chaos.

Appellants disingenuously assume that local governments would actually prefer the damage suits and potential liability their view would spawn to the time-honored remedy of judgment declaring an ordinance unlawful. In the first place the two are not exclusive. Appellants themselves sought both. Landowners aggrieved by restrictions are plainly not going to abstain from challenging their constitutionality, even if damages exist as an alternative.

Further, appellants turn the precedents on their head in arguing that invalidation of a statute is somehow more extreme or onerous to states and localities than the barrage of actions for damages their view of the law would unleash. The cases holding damages the proper remedy rather than derailment of a government program dealt with clearly compensable takings—the flooding of private property in *Hurley v. Kincaid*, 285 U.S. 95, or its actual seizure in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102. Compensation for the owners was a genuine consideration there, and the government program was an actual taking. Here, in sharp contrast, the ordinance simply regulates the extent to which appellants may build on their land. Their ritual invocation of their property rights gives them no justification whatever to raid the public treasury when those rights are controlled by an ordinance found to be valid by the state courts closest to the scene.

Appellants would have us believe invalidating a state or local law—a remedy they correctly note is to be sparingly applied (Br. p. 38)—is somehow more burdensome to state and local government than imposing monetary damages would be. It is not appellees who seek to change the law or encourage litigation (Appellants' Br. p. 39) but rather appellants, who would have this Court create a remedy in damages for those restricted by traditional municipal land-use controls which would shift the focus of the courts to complex damage suits, often requiring jury trials.

Later in their brief, appellants appear to concede (Br. p. 41) what they earlier disputed—that the damage claims they seek to pursue would hobble local governments far more than existing remedies. They laud the "deterrent effect" (p. 41, n.20) of damages on public officials. But aside from the chill the threat of such suits would doubtless place on all but the mildest land-use controls, whatever possible punitive value such actions might serve does not remotely warrant the radical tampering with constitutional principles appellants urge.

The radical nature of appellants' proposal is borne out by this Court's consistent refusal to find a compensable taking in case after case involving land-use controls far more stringent than those at bar, where appellants remain free to build up to five homes for resale on their five-acre tract. Not only in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, but in *Miller v. Schoene*, 276 U.S. 272, and *Goldblatt v. Town of Hempstead*, 369 U.S. 590, this Court rejected claims such as those here advanced. Most recently, this Court rejected the taking claim in *Andrus v. Allard*, ... U.S. ..., 100 S.Ct. 318, involving severe restrictions on personalty. Even in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, relied on repeatedly by appellants, the plaintiff recovered no damages. And although, as appellants note, the state was not a party to that suit, that was by the plaintiff company's choice.

This Court has consistently respected the traditional responsibility and upheld the rights of local governments to regulate the use of land within the community even when highly respected values are assertedly infringed. See *Village of Belle Terre v. Boraas*, 416 U.S. 1; *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50. Here, where no free-speech or right-to-travel claims exist, it would be an unjustified departure from settled constitutional principles to corrode so severely the right of the locality to control the use of land within its borders.

POINT II

The Radical Change In The Established Remedies For Unconstitutional Land Use Regulation Advanced By Appellants Would Disrupt Stable Economic Expectations And Frustrate Accepted Patterns Of Zoning And Local Government Police Power Responsibilities.

Appellants' attack is really aimed at zoning itself. By creating a compensable taking when zoning exceeds constitutional limits, it would subvert the structure of land-use controls which our federal system property reserves to the States and their political subdivisions. *Village of Belle Terre v. Boraas, supra; Village of Euclid v. Ambler Realty Co., supra.* Thus, controls of such critical matters as land-use regulation for "sanitation, public health, and parks and recreation" are "traditional government functions of the several states." *National League of Cities v. Usery*, 426 U.S. 833 at 851, n.16.

In recognition of the principal state and local responsibility for controlling land-use, federal environmental laws have authorized delegation of many of their powers to the States, *e.g.*, water pollution permits (Clean Water Act § 402, 33 U.S.C. § 1342), safe drinking water controls (Safe Drinking Water Act, 42 U.S.C. § 1421), air emis-

sion controls (Clean Air Act § 110(a)(2), 42 U.S.C. § 7410), and flood plain management (National Flood Insurance Act § 1361, 42 U.S.C. § 4102). While Congress has explicitly found the federal interests in these environmental land-use controls important, the Tenth Amendment secures State authority and insures that "the states retain broad discretion under the[se] regulations to control the use of their land in the scope of economic development." *Sierra Club v. E.P.A.*, 540 F.2d 1114, 1140 (D.C. Cir. 1976). This Court has recognized the state role in such critical land-use issues as housing equity, *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252.

In the half century since *Euclid*, a stable pattern of state and local land-use regulation has emerged. It is locally implemented under state enabling laws so as to be flexible and responsive to a region's policies for economic growth, maintenance of environmental quality, and energy resource management, as well as responsive to local needs and priorities. See, *e.g.*, Daniel R. Mandelker, *Environmental and Land Controls Legislation* (1976).

Nationally, a flexible and varied pattern of zoning has emerged. Indeed, a locality can even use its zoning authority to create the effective basis for real estate development, as New York City has done with its Zoning Resolution and its Landmarks and Historic Districts Law, upheld by this Court in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104. New York's Zoning Resolution establishes the perimeter of commercial development. Flexibility is provided in three ways: (1) variance procedures are available through the New York City Board of Standards and Appeals, a typical zoning appeals mechanism; (2) legislative changes are entertained through the City's planning commission; and (3) assessment and valuation disputes are adjusted through the City Tax Commission. The same elements, rather more simple

in structure, are found in the villages and towns around New York State. New York State has fashioned similar methods to deal with case-by-case adjustments needed as a result of state land-use regulation, such as the Freshwater Wetlands Appeals Board. Environmental Conservation Law Art. 24, Title II. The courts may be called upon in lieu of these administrative routes when an overly restrictive law must be set aside as unconstitutional. *Fred F. French Investing Co. v. City of New York*, 39 N.Y. 2d 587, 350 N.E.2d 381 (1976), *app. dism.* 429 U.S. 990.

New York City's zoning has even created value in the space "adrift" above a site, and allowed its transfer as a development right to another site. New York City Zoning Regulation, §§ 74-79 to 74-79.3. The utility of adjusting value in the context of setting development limitations on land has been established by scholars, *e.g.*, John J. Costonis, *Space Adrift* (1974), and was recognized by this Court in *Penn Central Transp. Co. v. City of New York, supra.*

What appellants would have this Court do is construct an inverse condemnation remedy to create a cause of action in damages for the difference between "free market value" and market value as regulated. To do so would disrupt the entire *Euclidian* pattern of land-use. Such a step would destroy the expectation of real estate developers, park managers, conservation interests, municipal planning boards, and landowners themselves. Consider the range of consequences such a disruption would involve:

How would the air rights over a site be measured? Such a gloss on the Fifth Amendment's "taking" provision would enmesh the federal courts in explaining what the appropriate measures of value are, in the absence of "comparable" cases. Until the comparables were found and a new set of patterns settled, there would be economic and regulatory chaos. Predictability would be lost.

Consider situations where land is actually confiscated to extend a public works project. Where the extension was originally in the plans, the land taken is compensated for at market value before the adjacent project was built; where the extension was a new idea, the compensation is based on the value of the site taken as increased in amount because of the adjacent projects being built. *United States v. Miller*, 317 U.S. 369; see "Eminent Domain—Enhanced Value of Property", 95 A.L.R. 3d 752 (1979). Should the need to compensate be extended to unconstitutionally restrictive zoning, as appellants urge, would some landowners be denied the windfall social increment of value which public works projects might bring them?

Should the owner's "highest and best use" in the market value sense, unfettered by any land-use regulation or public works like roads or nearby parks, fix the value of the parcel? Or should the taking be computed from the maximum constitutional regulation the state might have adopted? Dealing with these questions could open a Pandora's box for the deferal courts.

Development "value" is a creature of what the zoning laws will permit. That is the teaching of *Euclid v. Ambler*, Appellants seek to undercut this system by having this Court order that some Platonic ideal of free market value offers an outside limit of value which the owner is entitled to possess as a right of his ownership—abandoning *Euclid v. Ambler* and regressing to an anachronistic notion of total ownership, with the owner holding almost all the proverbial bundle of sticks and the community and its government nearly none. Their scheme would enmesh the federal courts first in drawing a factual line as between the outer limit of theoretically constitutional development and unconstitutional restrictions, and second in fixing a value for that potential difference in development intensity. Aside from what this would do to federalism, courts are ill-equipped to give advisory opinions as to which de-

velopment scheme is realistically the "highest and best use" of a parcel. That entails the skills of an entrepreneur, the uncertainties of financing and marketing, and the finely-tuned legislative judgment of a zoning enactment.

What would happen, for instance, if appellants obtained their inverse condemnation damages "award" and the City of Tiburon were then to repeal its zoning ordinance and allow high density garden apartments on the site? Would they have to pay back, *pro rata*, the damage award? Just as this Court awarded no compensation when it overturned a statute barring child labor on long-since rejected substantive due process grounds, *Lochner v. N.Y.*, 198 U.S. 45, so none is required when the police power in a land-use context is used to secure a common public value. The Agins have not, after all, as we have noted, been denied the right to develop their site.

What would happen if Tiburon decided to tax and recapture any enhanced value which its adjacent public works projects or its zoning controls bring to a parcel? Might not such a tax eliminate the "windfall" not be a fair and valid way to finance compensation for zoning "wipe-outs" in a given city? Cf. Hagman and Misczynski, *Windfalls For Wipeouts* (1978); D.G. Hagman, "Compensable Regulation: A Way of Dealing With Wipeouts From Land-Use Controls," 54 U. of Detroit J. Urb. L. 45 (1976). Such a use of state or local real property taxation is invited by the Agins' proposal. If such taxation began, it would have a far more stifling effect on real estate development than do the current zoning and environmental land-use controls. Why should this Court play the activist role appellants demand of it in promoting such a change in state laws for real property use and taxation?

There has been no physical invasion of the Agins' property by Tiburon. No traditional use of the land has

been taken; "loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a taking claim." *Andrus v. Allard*, ... U.S. ..., 100 S.Ct. 318, ...

POINT III

New York Has An Effective Land-Use Regulation Scheme Which Appellants' View Would Undermine.

Appellants' jurisdictional statement contended New York's law in this area was unclear. This is inaccurate, and in fact the evolution of the law in New York effectively shows how the states may best furnish a remedy in land-use cases in which a taking is claimed. New York's Court of Appeals held in *Fred F. French Investing Co. v. City of New York, supra*, 39 N.Y.2d 587, 350 N.E.2d 381, app. dism. 429 U.S. 990, that a clearly constitutional zoning change creating a special park district which deprived the owner of the use of the tract did not constitute a compensable taking. New York limits such takings, in "all but exceptional cases" (*Fred F. French v. City of New York, supra*, 39 N.Y.2d at 593, 350 N.E.2d at 385), to acts of government "in its enterprise capacity, where it takes unto itself private resources in use for the common good." *Lutheran Church in America v. City of New York*, 35 N.Y.2d 121, 128, 316 N.E.2d 305, 310 (1974).

Recently in *Matter of Spears v. Berle*, 48 N.Y.2d 254, 397 N.E.2d 1304 (1979), New York clarified its rule, holding, in a proceeding to review a state agency's denial of a permit to place fill in a protected wetlands area, that "only when the evidence shows that the economic value, or all but a bare residue of the value, of the parcel has been destroyed has a 'taking' been established ***." 48 N.Y.2d at 263, 397 N.E.2d at 1308. The court went on to rule that an aggrieved landowner asserting facts which actually support a taking claim—unlike appellants here—has a right to a trial on that issue.

The California courts properly held the factual assertions at bar do not justify such a trial, since, in contrast to *Spears*, the ordinance concededly permits applicants to erect five homes on their five-acre parcel. What is significant here is that New York furnishes a remedy for an aggrieved landowner under a balanced scheme which adopting applicants' radical view of the Fifth Amendment would jeopardize.

Spears v. Berle upheld a state law protecting freshwater wetland areas from overdevelopment. New York Environmental Conservation Law, Art. 24. Similar New York statutes protect tidal westlands, needed as a breeding ground for fish and shellfish, Environmental Conservation Law, Art. 25, as well as the Adirondack region, where the legislature has found overdevelopment would destroy scenic and recreational values. New York Executive Law, Art. 27. All such statutes, as well as historic landmark laws (*Penn Central Transp. Co. v. City of New York, supra*) and zoning ordinances, would be placed in jeopardy by a decision allowing damage suits where the legislation is found to exceed constitutional limits. Ironically, much of this legislation, notably historic district laws and zoning itself, benefits individual landowners as well as the community by augmenting the value of an entire area. Appellants, who write as if self-appointed crusaders for all landowners, are in fact betting with the shirts of numerous owners of property whose investments would be destroyed were these laws impaired.

Foster v. Scott, 136 N.Y. 577, 32 N.E. 976 (1893), which appellants describe as "seminal" (Br. p. 29), has nothing to do with this case. There the court properly set aside an 1882 law purporting to deny compensation to a certain landowner whose property was literally taken by the municipality for a street. The zoning and other land-use laws at which appellants tilt did not then even exist.

CONCLUSION

The judgment of the Supreme Court of California should be affirmed in all respects, or in the alternative, the appeal dismissed for want of a substantial federal question.

Dated: New York, New York
March 21, 1980

Respectfully submitted,

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FOR ARGUMENT

Supreme Court, U.S.
FILED
MAR 24 1980
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,
Appellants,

vs.

CITY OF TIBURON,
Appellee.

On Appeal from the Supreme Court of California

Brief of *Amicus Curiae,* City of San Jose, California and Other Joining Cities and Counties of California In Support of Appellee

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SORG PRINTING COMPANY OF CALIFORNIA, 946 FIRST STREET, SAN FRANCISCO 94105

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STATEMENT OF THE CASE

Amicus curiae City of San Jose adopts in full the statement of the case made by appellee City of Tiburon (hereinafter "Tiburon").

INTEREST OF AMICUS CURIAE CITY OF SAN JOSE

This appeal will shape the character and conduct of land-use litigation for the future. *Amicus curiae* City of San Jose (hereinafter "City") and other joining cities have a present, and predictably continuing, interest in such litiga-

tion, typically as the party defending a regulation against the landowner's claim of an unconstitutional taking. But no wanton disregard of private property rights entangles City in litigation repeatedly. Rather, it is the sad fact that, ever since God rested on the seventh day of Creation, no mortal governor has found the perfect wisdom and skill with which to harmonize the conflicting demands in land-use planning and regulation.

City's interest in this appeal is typical, in varying degrees, of concerns shared by other California cities and counties joining in this brief. All face similar fiscal problems; all follow the same procedures in land-use planning, zoning, conservation, and environmental quality; and all have experienced at least the pressure of inverse condemnation litigation if not its actual grip upon their legislative bodies and treasuries.

The physical conditions of City present a first set of land-use planning demands. City includes both flood plains and steep hillsides; each poses special risks for development, and each is vulnerable in different ways to the California calamity named earthquake. In addition, City covers some 156 square miles of territory. The magnitude of this area guarantees topographical diversity. It also creates problems of transportation and communication. The City Council must agonize yearly, in its budget hearings, over the delivery of municipal services throughout that extensive area.

Even the air resists circulation. Lines of hills to the east, south and west of City block and hold pollutants as they rise from the valleys, and a familiar reaction with strong sunlight and moisture generates that California ether called smog. Almost every morning City wears, with dubious honor, a golden-brown crown of smog, to be removed only by grace of an afternoon wind.

People, with their personal and their commercial needs, present the second set of demands. People desire shelter, preferably in the form of single-family houses affording privacy and appearing gracious. In order to pay the high cost of such housing in California, people must work. Getting to work in City usually means driving an automobile over congested freeways and secondary roads for at least twenty minutes, often much longer. For their part, employers may have in mind criteria other than those of convenience to employees when deciding where to locate their businesses. Industry considers such things as transportation, accessibility and visibility, local taxation, location of suppliers and customers, and cost of land, just to mention the major items. Perhaps some municipality has struck perfection in the location of its housing and industry and transportation corridors. Unfortunately, City has not yet achieved such an urban miracle.

A third set of conflicting demands comes from the California Legislature itself. Common sense tells us that everyone needs to breathe air and drink water. Almost everyone, including the most active entrepreneur in his private moments, prefers beauty to ugliness, and prefers natural beauty at that. Long ago Will Rogers told us that land is something they aren't making any more of. Having learned this common wisdom, the California Legislature during the past two decades has enacted a broad range of land use planning, environmental quality control, and specific conservation laws.

City must obey those laws in making land-use decisions. But those laws do not in themselves resolve the conflicting demands made upon City. Instead, the statutes exalt the resolution of those demands into a legal duty. The effect is one of defining and sharpening the choices faced by the

City Council, rather than offering deliverance from the irreconcilable forces at play.

Only god-like wisdom would give the correct answer to every land-use question. City council members, being fallible by nature and nonprofessional by circumstance, rely upon their legislative discretion. The California courts have traditionally assured local legislators that they do indeed possess such discretion. *E.g., Ensign Bickford Realty Corp. v. City Council,* 68 Cal.App.3d 467, 137 Cal. Rptr. 304 (1977); *Toso v. City of Santa Barbara,* 101 Cal. App.3d 934, 943, ... Cal. Rptr. ..... (1980). City's concern with this appeal relates to the consequence of exceeding a legitimate exercise of that discretion.

The significance of the California Supreme Court's decision here consists in its explicitly addressing the pragmatic problems with which cities throughout California must contend in this new era of diminishing natural resources, dwindling fiscal resources, and changing demographic patterns.

City also has a specific interest in this appeal as a litigant. That interest typifies those of other cities joining in this brief. Two inverse condemnation cases against City remain pending in the federal Northern District Court of California. The first of these, *Barbaccia v. County of Santa Clara, et al.,* Civil No. 76-1182-SW, arose from City's refusal to annex and prezone for high-density residential use some 100 acres of land already developed as a golf course. The surrounding area is dedicated to single-family residential development on small lots. City, reflecting in part the wishes of neighborhood residents, decided that the preservation of recreational and/or open-space uses on the land best served the needs of its citizens during the period of its general plan. (The plan extends through 1990, subject to earlier amendment at annual public hearings.)

The landowners charged that, in designating the land for private recreational use in its general plan, City had effectively denied all economic use of the land and taken it for public purposes. In defense, City pointed out that the general-plan designation merely confirmed an existing use chosen by the landowner and, in any case, the golf course produced a reasonable return on investment. On August 31, 1979 the trial judge orally granted City's motion for summary judgment. Since then the trial court has not proceeded to adopt findings of fact and conclusions of law, nor has it entered final judgment against the landowner. The complaint seeks some $5,000,000 in damages. But those estimated damages relate, of course, to an alleged taking in July of 1975.

The second case pending in the Northern District of California, *Oceanic California, Inc. v. City of San Jose,* Civil No. 78-2622-AJZ, pits City against a subsidiary of a "Fortune 500" corporation. (Oceanic California, Inc. is the California land/development subsidiary of Castle & Cooke, Inc. whose annual revenues exceed those of City by about a factor of four.) This landowner purchased some 10,000 acres of unimproved land, part of which now lies in the nearby city of Morgan Hill, during the early 1960's.

During the late 1950's and early 1960's City raced against neighboring cities in a land-annexation contest. In the southern sector, City proved especially successful (or, in hindsight, unfortunate). City managed to incorporate territory lying over ten miles from its urban center through a series of so-called "strip annexations" along the major highway running south. No urban services existed in that territory.

A good deal of plaintiff's land was incorporated during this period. In terms of its physical character, the land is mainly hills, with some level areas, but vulnerable to geo-

logic instability and soil erosion. Its main historical use was for grazing cattle on wild vegetation. Vacant and relatively barren aptly describe the bulk of the land.

In 1970 City's land-use policies changed dramatically. Faced with sudden resistance from its citizens against increased taxation, brought home by the then-unprecedented defeat of bond-issuance proposals, the City Council looked with new concern upon the great stretches of territory it had undertaken to govern and to service. The Council then adopted its "urban development policy" as part of the general plan, in order to control the urban expansion. Under this policy, those vacant lands within the urban core, where most municipal services already existed without further capital improvements, would first be dedicated to new residential and industrial uses. In California, the term of art for this strategy is "in-filling." By requiring development first of unimproved central parcels, "in-filling" prevents development from occurring most rapidly at the periphery of City. This policy likewise assures greater efficiency in providing services within the urban core.

This new policy ran counter to plaintiff's original plans to construct virtually a new city, having a population of over 100,000 persons, about fifteen miles south of City's center. The landowner had never gone ahead with that grandiose concept during the 1960's. The reasons for its unhurried approach remain unexplained, and are likely to be disputed. By the middle of the 1970's, plaintiff could not demonstrate that its project was consistent with City's current land-use policies.

In 1978 City finally denied the only development application which plaintiff had ever pursued to a conclusion before the City Council. The landowner's response, long threatened by its attorney at Council hearings, took the form of

an action for inverse condemnation seeking damages of $30,000,000. As additional relief, the complaint sought a declaration of invalidity on City's general plan as applied to the property. Moreover, plaintiff asked the court to assert continuing jurisdiction subsequent to invalidation in order to assure that City afforded it an economically viable project under any new regulations enacted according to the court's decision. City filed a motion to dismiss under FRCP 12(b)(6). After oral argument on October 18, 1979, the district court took the motion under submission. The district court has not yet ruled on the motion.

City is concerned that the decision on this appeal will affect the rulings in both of those pending cases. Adverse rulings could expose City to judgments totalling $35,000,000 or more in monetary damages. This sum is more than ten percent of City's present annual budget. That should suffice to demonstrate tangibly City's interest in this appeal. But City's interest is not simply pecuniary.

Appellants and their *amici* would have this Court believe that California cities simply do not want to pay money for their violations of the Fifth Amendment, and that the California Supreme Court has relieved them of that burden at the expense of the individual landowner. That view is somewhat crass. It depicts local government as institutionalized thievery. It treats land-use regulation as the means of tyranny, rather than as the practical expression of the public will in pursuit of the public weal.

City's policy of controlled urban growth has survived at least three mayoral elections, five councilmanic elections, and, most importantly, a thorough review by a citizen's committee while preparing its current general plan in 1975. During the past few years, as a result of property-tax reform measures passed by the voters of California, the

financial necessity for such a policy has taken on very imposing proportions. City simply lacks the tax revenues needed to deliver and maintain municipal services in its most remote areas. Indeed, the task is not easy even within the core of City.

No doubt, some landowners have been frustrated in their development plans. But frustration, not to mention plain loss, remains a permanent feature of the world of investment. It occurs to investors in the stock market; investors in real estate enjoy no exemption. Perhaps the most ready means of expressing such frustration is to litigate against City; for litigation promises to translate great, but lost, expectations into constitutional wrongs compensable with money. The threat of such litigation—or even attorneys' fees alone—can cause City to hesitate in carrying out its land-use policy. The fact of such litigation means that the citizens as a group must pay an individual landowner for a theoretical loss of potential value caused, in the final analysis, by changing economic and environmental conditions not controlled by City or its citizens.

The decision of the California Supreme Court below relieves the unfair burden placed upon a local government by the judicial remedy of inverse condemnation.

SUMMARY OF ARGUMENTS

California cities today face the predicament of providing an extraordinarily wide range of municipal services while suffering a decrease in their tax revenues and fiscal resources. In their land-use planning and regulation, cities must reconcile conflicting demands arising from, on the one hand, the conservation and environmental mandates of state law, and on the other hand, their own distinctive local needs for commercial-industrial growth, a proportionate amount of housing, and the orderly, efficient delivery of services throughout incorporated areas. The importance of the California Supreme Court's decision in this case is its well-considered response to the threat which the inverse-condemnation remedy poses for California cities placed in this real predicament.

In rejecting the remedy of money damages for a land-use regulation exceeding the police power, the California court did not misconstrue, but rather correctly interpreted and applied, substantive law under the Fifth Amendment as developed in this Court.

Appellee Tiburon's ordinance preserves some residential use (up to one dwelling unit per acre) expressly and as a matter of right. In taking judicial notice of that remaining beneficial use, the California court properly ruled that Agins' complaint did not allege any taking of private property in violation of the Fifth Amendment. No constitutional issue is presented by a plaintiff-landowner who merely alleges that a land-use regulation has destroyed all use and value of the property, but who fails to apply for a beneficial use explicitly available under the provisions of the regulation. Moreover, multiple considerations of judicial administration warrant dismissal of such a complaint on a pre-trial motion attacking the pleading.

The owner of unimproved land holds no distinct investment-backed expectation that he may develop the land intensively under residential zoning in effect at the time of his purchase. Thus, the Agins acquired their property subject to an implied limitation that a change in zoning might affect potential development of the land, prior to the time they actually applied for and obtained approvals and then spent money on actual improvements. Tiburon's ordinance, therefore, did not defeat any investment-backed expectation reasonably fostered by Agins.

This case contains no element of physical invasion or actual public use of private property. The absence of this critical factor, upon which this Court has placed special emphasis in its most recent decisions under the Fifth Amendment, confirms that the California court correctly held that Tiburon's ordinance effected no taking. It is both unrealistic and illogical to contend, as do appellants here, that zoning requiring some open-space use serves to transfer to the public some right of physical access to, or enjoyment of, the property so regulated.

The police power under which land-use regulations are enacted is entirely distinct from the power of eminent domain. The police power procures a public benefit; but this benefit is inherently different from, in content and quality, the public purpose and use for which the power of eminent domain may be exercised.

Appellants would confuse that vital distinction through a studied exaggeration of some language found in this Court's prior decisions. But a fair reading of this Court's seminal decision in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922), dispels any notion that the power of eminent domain is co-extensive with the police power, or that excessive regulation under the police power in and of itself requires a court not only to invalidate but also to award just compensation.

Invalidation is the appropriate remedy, as well as an extremely practical and substantial remedy, for a taking by excessive regulation. Appellants conjure up only imaginary abuses of that remedy. In reality, invalidation enables local government to reconcile the respective rights of landowners and the public at large (including landowners in their other role of citizen-taxpayers). At the same time invalidation leaves to legislative control the

articulation of comprehensive land-use planning and regulatory schemes, as well as the management of its public treasury. Principles of federalism and comity support this Court's affirming the decision below; and the federal Constitution requires no other result.

ARGUMENTS

I. In Affirming the Trial Court's Dismissal of Agins' Complaint on a Pre-Trial Motion, the California Supreme Court Correctly Decided That the Landowner Should Not Receive a Trial on the Merits When He Comes into Court Alleging That the Regulation Has Totally Destroyed the Use and Marketability of His Property but Fails to Apply for Uses Expressly Granted Under the Challenged Ordinance.

A. INVERSE CONDEMNATION IS THE LAND DEVELOPER'S SWORD.

The intimidating force of inverse condemnation grows proportionately with the relative ease with which a landowner may plead himself into court and then carry himself to trial against City. As a further tribulation, City must endure the uncertainty that the court's decision might affect other land-use decisions to be made in the meanwhile.

Appellants' argument that the question of a taking always remains a "question of fact" to be resolved at trial is but to introduce City's predicament. But when one adds that the plaintiff-landowner may be excused from applying for the uses explicitly available on the face of the challenged ordinance, and when one concludes that monetary damages must always remain available as a remedy if the court finds a taking, then one has artfully fashioned a weapon sufficiently powerful to force even the most dedicated legislator to hesitate from carrying out the land-use policy his constituents may have approved.

Admittedly, the purpose of the Fifth Amendment is protective, to defend private property. This is a good reason

why this Court should not permit it to become part of an offensive strategy devised by the would-be developer to force local government either to approve his project or to pay for the full potential value of that project through inverse condemnation.

B. A LAND-USE CONTROVERSY IS NOT RIPE FOR ADJUDICATION UNTIL THE LANDOWNER EXHAUSTS THOSE POTENTIAL USES GRANTED AND PROCEDURES AVAILABLE UNDER THE REGULATION.

Both the state and federal courts have traditionally exercised a necessary degree of discretion in determining when an alleged controversy is ripe for adjudication. In this regard the courts have refused to exercise their jurisdiction where the plaintiff has not exhausted his administrative remedies. *McLarty v. Borough of Ramsey,* 270 F.2d 232, 234 (3rd Cir. 1959); *United States v. Superior Court,* 19 Cal.2d 189, 194, 120 P.2d 26 (1941). The requirement of exhaustion of administrative remedies is particularly important where the constitutionality of legislative action is challenged. To require less of appellants herein "would be directly contrary to the policy of avoiding constitutional decisions until the issues are presented with clarity, precision and certainty." *Rescue Army v. Municipal Court,* 331 U.S. 549, 576 (1947). This is equally true of suits questioning the constitutionality of zoning ordinances. *Brawner Building, Inc. v. Shehyn,* 442 F.2d 847, 854 (D.C. Cir. 1971).

This Court's opinion in *Moore v. City of East Cleveland,* 431 U.S. 494, 497 n.5 (1977), approved that rule, even though not applying it there to a party who suffered criminal prosecution under an ordinance which did require exhaustion. In civil cases, by inference, the plaintiff must first exhaust remedies, for the reasons more fully elaborated on by the Chief Justice in his dissenting opinion. *Id.* at 522.

Those reasons embrace not only considerations of federal judicial administration, but also the desirability of having local government place a practical meaning upon the language and purpose of the challenged regulation prior to any adjudication of potential constitutional issues. If local government's action serves to eliminate any such constitutional questions, then resort to the federal courts may become unnecessary. In addition, there are considerations of federalism and comity, not to mention the dictates of common sense. As the Chief Justice noted in his opinion in *Moore v. City of East Cleveland*:

> [I]t is common sense to permit the simple, speedy, and inexpensive processes of the administrative machinery to sift the facts and compile a complete record for the benefit of any reviewing courts. Exhaustion avoids interruption of the administrative process and allows application of an agency's specialized experience and the broad discretion granted to local entities, such as zoning boards. Indeed, judicial review may be seriously hampered if the appropriate agency has no chance to apply its experience, exercise its discretion or make a factual record reflecting all aspects of the problem.

Id. at 524-25.

These principles possess increased vitality when applied to this case. Consider the evidentiary problems inherent in demonstrating that Agins' five undeveloped acres possess no feasible use under Tiburon's ordinance. That ordinance, of course, confers a residential use as a matter of right. Ordinance 123 N.S. § 2, Appendix D to Jurisdictional Statement Appendix (hereafter "JSA"), pp. 31-32. The ordinance also seeks to protect and preserve open-space characteristics of the land. Ordinance 123 N.S. § 2, JSA, p. 30. Were the landowners permitted a trial in the California courts, they would predictably argue that other requirements

in the ordinance — especially those concerning the slope and grading of hillside land, the preservation of natural features, drainage and soil stability—would make it completely impractical to develop the land for the permitted residential use, if only because of prohibitive construction costs. To prove such a case, the landowner would expectedly introduce expert testimony. Those experts might include architects, soils engineers, contractors from several specialty trades, landscape designers, local planning officials, and real-estate marketing and financing consultants. The court then would have the doubtful privilege of evaluating tract maps and engineering studies of terrain unfamiliar to it except as land to be parceled up. In addition, the landowner would predictably argue that Tiburon would never permit the "reasonable use of open space land" sought under Ordinance 123 N.S. *Id.* Here the court would be called upon to exercise its own creativity in devising potential uses, theoretically permissible but perhaps never formulated by the parties, which might rescue or sink the ordinance depending upon their reasonableness.

Is it sensible to choose, as an alternative to such a lengthy trial on the question of taking, a rule requiring the landowner first to make an application to the city under the challenged ordinance and thereby to learn how, in fact, the city will apply its ordinance to this land? The California Supreme Court in this case made such a sensible choice. It is the choice which this Court should approve and adopt for those additional reasons germane to federal judicial policy.

C. AGINS' COMPLAINT FAILED TO ALLEGE ANY DEPRIVATION OF A PROPERTY RIGHT PROTECTED BY THE FEDERAL CONSTITUTION.

The California courts decided that Agins had not stated a cause of action for inverse condemnation and, after Agins declined to amend a second cause of action for declaratory

relief, that Agins had not stated any claim that Tiburon's ordinance violated the Constitution. That decision is consistent with recent decisions of this Court on the substantive law of takings under the Fifth Amendment. To use the key phrase from this Court's decision in *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 124 (1978), the complaint alleged no interference by Tiburon with any "distinct investment backed expectations" in residential development of the land.

It is not sufficient for appellants to argue that they purchased the land under residential zoning and that Tiburon's open-space studies and/or ordinances destroyed any feasible residential use of the property. This Court rejected, in *Penn Central,* any characterization of an unrealized development scheme as a protected property right:

> [T]he submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. . . . "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole. . . .

Id. at 130-31.

In *Penn Central,* of course, this Court addressed the landowner's right to develop the air space above the existing railroad terminal. But the same logic which defeats any artificial isolation of air-space rights also defeats any isolation of a potential high-density residential use, for example, from other potential uses and actual benefits of ownership

held by the owner of undeveloped land. Why should the landowner be permitted to prove a taking of but one selected potential use, absent any investment in support of that use? Surely high profitability influences the landowner's selection. But hoped-for profit is too airy a substance out of which to fashion a vested property right. Indeed, the police power may even prohibit an existing, most beneficial use without effecting a taking, precisely because the value of the land as a whole may not have been greatly diminished. *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 594 (1962).

This, appellants would argue, is too harsh a rule. But any contrary rule would effectively limit the power of local government to control the development of unimproved land, once the land is acquired by an investor hoping to undertake the most intensive permitted development or, at least, to realize (at the expense of local government) the full value of the land as so developed. Indeed, government could not control the *timing* of development, simply because every would-be developer will have perfected his right in the year of his investment, no matter when he applies and no matter how much the world has changed.

A speculation on unimproved land is not a distinct investment-backed expectation in a realized development project. The landowner may have built his castle, but he has not brought it down to earth. His reasonable expectation might be that he may enjoy the land, in its natural condition, as a private recreational facility. Or it may be the expectation that, after paying its carrying costs, he may ultimately resell the land at a profit or, alternatively, establish some economic use of the land, subject to then-prevailing commercial and financial conditions and governmental regulations. The courts need not define such reasonable expectations in the abstract. The only question here is whether the

challenged regulation has interfered so drastically with the landowner's use of his property as a whole as to raise an issue of taking under the Fifth Amendment.

Tiburon's ordinance did *none* of the following:

1. Prohibit any existing land-use;
2. Restrict only Agins' land, in isolation from others in the city;
3. Advance an impermissible public purpose;
4. Authorize physical entry and use of the land by the public.

This last (missing) feature deserves special attention. As this Court stated in *Penn Central*:

> A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by Government. . . [citations omitted]. . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Id. at 124.

Notwithstanding the theoretical possibility that, under some compelling set of facts, a taking might arise from a regulation which interferes too extensively with "distinct investment backed expectations," this Court in its prior decisions has shown proper reluctance to hold such a possibility to be an actuality in the case before it—in the absence, at least, of any physical invasion of private property. This Court's *practical* emphasis on the physical confiscatory result of the regulation most accurately defines the present law on takings.

Accordingly, this Court did find a taking in *Kaiser Aetna v. United States,* ..... U.S. ....., 100 S.Ct. 383 (1979), precisely because the landowner had spent money in transforming a once land-locked lagoon into a waterway subject to a public navigational easement held by the federal gov-

ernment. The opinion in *Kaiser Aetna* specifically noted that the landowner had consulted the government before improving the lagoon. Although giving notice to the government did not create any estoppel against assertion of the navigational easement, the landowner had effectively perfected its reasonable expectation that its investment in improvements would produce a private benefit, instead of a free waterway for the public.

It is true, as appellants here point out, that *Kaiser Aetna* concerned the effect of a federal regulation. However, as this Court expressly stated in the last paragraph of its opinion, the taking would result not from the governmental regulation considered alone, but rather from the public's physical invasion and use of the lagoon under a right created by the regulation. *Id.* at ....., 100 S.Ct. at 393.

There is no inconsistency between these decisions and that of the California Supreme Court in this case. Agins' complaint, in attacking an ordinance expressly conferring some residential use as a matter of right, stated no claim of a constitutional violation under any variant of the law of takings recognized in this Court or the California courts. Appellants protest that dismissal of the complaint on a general demurrer is a harsh procedure. However, permitting clearly unmeritorious cases to proceed to trial has its painful consequences for appellee Tiburon, the judiciary, and ultimately the public at large.

II. In Merely Rejecting the Remedy of Monetary Damages for Regulatory Takings, the California Supreme Court Did Not Misinterpret Substantive Law Under the Federal Constitution.

A. THE CALIFORNIA COURT COULD CONTROL THE IMPLIED REMEDY OF INVERSE CONDEMNATION DAMAGES WITHOUT OFFENDING THE CONSTITUTION.

In affirming the dismissal of Agins' first cause of action for inverse condemnation, the California Supreme Court ruled that a monetary remedy, in the form of a forced pur-

chase of the land by government, will not be available in the California courts for an alleged taking through overly restrictive land-use regulation. This Court need not give that decision any broader meaning. The California court concerned itself with remedy, but did not disturb the substantive law of takings.

Nothing in the Fifth Amendment requires that money remain an always-available remedy for a taking not involving an actual physical invasion of private property. Moreover, nothing in the Fourteenth Amendment precludes a state court from controlling judicially-implied remedies under the Fifth Amendment and analogous provisions of the state's own constitution. *Cf. Hardware Dealers' Mutual Fire Insurance Co. of Wisconsin v. Glidden Co.,* 284 U.S. 151, 158-59 (1931) (freedom of state legislature to substitute one remedy for another, without offending the Fourteenth Amendment, provided that the substituted remedy is substantial and efficient).

Even appellants' own fundamental theory—that a land-use regulation somehow converts a private property right into public ownership—leads to the conclusion that state law may limit the availability of monetary compensation. The definition of real property interests has traditionally remained the province of state law, statutory and judicial. *Wallis v. Pan American Petroleum Corp.,* 384 U.S. 63 (1966) (state law, not federal, governed rights of parties under oil and gas lease originally granted by United States under its statute). Thus the California court could properly exclude the "benefit" of an open-space zoning ordinance from the class of real property interests recognized under California law; and by doing so, that court might have prevented the operation of the takings clause in the area of such regulation. But the California court has not gone so far. It has not chosen to define or redefine concepts of

private property in the context of land-use regulation, but rather it has chosen to control the remedies available for a violation of the traditional, substantive law on takings.

B. ONLY BY CONFUSING THE POLICE POWER WITH THE POWER OF EMINENT DOMAIN CAN APPELLANTS HOPE TO PRESERVE MONETARY DAMAGES AS A CONSTITUTIONALLY REQUIRED REMEDY.

Appellants deliberately confuse the power of eminent domain with the police power under which land-use regulations are enacted, in order to derive the hybrid concept of regulation with compensation. In their view, if a regulation "goes too far" by effectively destroying all economic use and value of the land, then government must pay just compensation, even though government intended only to exercise its police power and not to appropriate the land for public use in the literal, physical sense.

The crux of appellants' argument is their presumption of confiscatory intent. But that presumption has no predicate. It cannot rest upon the ultimate fact that the landowner may possibly prove his total loss of market value. How can one logically equate the landowner's private economic loss with any equivalent public acquisition—especially where that acquisition does not appear in the form of an actual physical use of the property? Government may legitimately regulate private property, for example, in order to encourage a voluntary reallocation of scarce resources amongst private parties; and the resulting benefit to the public does not in itself suffice to establish a taking. *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 165-66 (1958) (restriction on operation of gold mines during wartime designed to reallocate scarce machinery and labor).

It is true, of course, that, in enacting a regulation, government must have reasonably sought some public 'benefit' within the reach of its police power. Often the benefit

derives from the elimination of some noxious use or "nuisance"; and in such cases the reach of the police power is conceded to be extensive. *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, ... (1978), and cases cited therein. But a benefit to the general welfare procured by regulation does not possess the same content and quality as those necessary public uses, inherently physical in character, for which the power of eminent domain may be exercised. For example, zoning regulations designed to assure a desirable residential environment, or to deter the congregation of transients and socially disfavored persons in a "skid-row" district, procure a moral benefit for the community which is not susceptible to translation into any public use of the property restricted. *Young v. American Mini-Theaters,* 427 U.S. 50 (1976); *See, generally, Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974).

Under this analysis, appellants' effort to fold the police power back into the power of eminent domain fails utterly. Government power is simply government power, appellants would argue. But that is simply to withdraw from the arduous intellectual effort of drawing critical distinctions.

The search for the elusive line of demarcation between a valid exercise of the police power and an invalid exercise tantamount to a compensable taking has consumed the energies of scholars and jurists ever since Justice Holmes, in his opinion in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922), apparently placed the police power within the same continuum in which the power of eminent domain lies. It is perhaps too late now to add anything novel to this commentary, unless one takes that opinion as a point of departure for a venture into innovative structuring of legal and economic land-use policies. It is enough to point out here that, like any strong stimulant, Justice Holmes' opinion has excited remarkable creativity in the area of

land-use theory, even though the stimulation itself results from the juxtaposition of disparate government powers which otherwise might have been considered remote.

The time has arrived to see that juxtaposition for what it is, in the context of the facts of *Pennsylvania Coal,* and so to reject any theoretical or practical continuity between the police power and the power of eminent domain. The statute challenged in that case prevented the coal company from mining coal beneath the surface of land which the company had conveyed by deed with an express reservation of subsurface mineral rights. In their suit to enjoin the coal company's mining, the plaintiff-landowners (grantees under the deeds) relied upon the statute as defeating the coal company's rights. The Pennsylvania Supreme Court conceded that the company had contractual and property rights protectable under the federal Constitution. However, the Pennsylvania court held that the statute, as a legitimate exercise of the police power for the purpose of protecting the public from the danger of subsidence, could effectively bar the exercise of those rights.

This Court reversed, thereby dissolving the state court's injunction. *Id.* at 416. The significance of the decision is defined by these fundamental aspects of the case:

> A. The coal company held vested property rights in the subsurface coal. Those rights were owned prior to, and were reserved under, the conveyances by deed to the plaintiffs. The company reasonably expected that its investment in the coal could be profitably realized at some future date without interference from the grantees—or from the state in aid of the grantees.
>
> B. The state effectively appropriated the company's coal for public use by requiring that the coal remain physically in place as a subterranean support for plaintiffs' lands. In essence, the coal company lost a valuable commodity, while the public acquired its use as a pillar supporting the surface. Moreover, the loss was total.
>
> C. This Court awarded no monetary damages to the coal company, but simply relieved it from a judicial restraint based upon a statute of questionable validity.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

What Justice Holmes said in this context has, of course, acquired a significance virtually independent from the actual decision of the Court. Most frequently cited is his verbal parallel between the regulatory and the eminent domain power: "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking" *Id.* at 415.

But the ease of Holmes' expression masks an enormous conceptual difficulty involved in conjoining the two powers. Is it not the legislature which should "recognize" its "taking", after judicial invalidation, and then correct its excessive regulation?

A basis for answering affirmatively is presented by Justice Holmes' more expansive and balanced reasoning earlier in the opinion:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there

> must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts.

Id. at 413. The first part of this statement no longer provokes controversy. As this Court observed in *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 131 (1978), the magnitude of the diminution in value does enter into the question of the regulation's validity; and this Court has not invalidated regulations resulting in as much as an 87.5% loss of property value. *See Hadacheck v. Sebastian,* 239 U.S. 394 (1915).

Hence the "implied limitation" on private-property values created by the very existence of a sovereign and democratic government is, in economic terms, very great in scope. In terms of content and application, legitimate regulation under the police power also possesses a scope which "expands" or "contracts" according to changing conditions—according to the course of urban development, the evolution of social and cultural values, environmental conditions, economic forces, and a myriad of other local, tangible pressures. *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 387 (1926). Accordingly, the "magnitude" of land-use regulation which may violate the landowner's right to due process of law does not declare itself in any mathematical formula and, even if it did, would not necessarily result in a violation in every historical period and in every urban context.

Properly analyzed, Justice Holmes' formulation tells us only that, when that critical "magnitude" is reached, the police power will no longer "sustain" the legislative "act." A court, therefore, must invalidate the legislative act. If then the legislature chooses to proceed, the legislature must

decide for itself whether it will exercise its distinct governmental power of eminent domain, and thereby "sustain" its original act. Nothing in Justice Holmes' opinion indicates that a court must, or should, direct the exercise of such legislative discretion following judicial invalidation.

Even more foreign to the opinion is any suggestion that a court must, under constitutional mandate, order local government to pay compensation to the landowner as the *immediate consequence* of judicial invalidation. Were that the meaning of *Pennsylvania Coal,* eminent domain would become a power shared by the judiciary.

The due process clause of the Fifth Amendment should not be read so as to subsume, and thereby empty of all independent significance, the succeeding clause requiring government to pay "just compensation" when it takes property. The latter clause concerns itself with intentional, physical seizure of private property for public use—a different subject and a different governmental power, warranting separate constitutional expression. It forbids the sovereign from expropriating property without payment. This interpretation of the Fifth Amendment finds support not only in historical antecedents exemplifying abuses of sovereign (monarchic) power, but also in judicial deference to a coordinate branch of representative government—to a legislative branch which expresses the public will, through open, deliberate, and well-measured proceedings.

C. INVERSE CONDEMNATION REMAINS AVAILABLE IN THE CALIFORNIA COURTS FOR PHYSICAL TAKINGS OF OR INJURY TO PRIVATE PROPERTY.

The California Supreme Court has maintained the distinction between the power of eminent domain and the police power. Its decision in this case presents only part of that distinction. Another recent decision offers the other part.

In *Jones v. People ex rel. Department of Transportation,* 22 Cal.3d 144, 583 P.2d 165, 148 Cal.Rptr. 640 (1978), the California Supreme Court preserved the remedy of inverse condemnation for a landowner who had lost a right of physical access to his property as a result of changes and delays in the state's planning for a freeway route. The state and local agencies agreed to close off adjacent public roadways. Ultimately, the landowner lost any opportunity to develop the land for intensive residential use, for lack of direct access to roadways capable of carrying traffic from the proposed subdivision. The California court afforded the landowner an inverse condemnation remedy, notwithstanding the legitimacy of the state's (and local government's) activities considered in isolation.

In this respect, the California Supreme Court's recent decisions remain perfectly consistent with those of this Court. *Kaiser Aetna v. United States,* ..... U.S. ....., 100 S.Ct. 383 (1979); *Andrus v. Allard,* ..... U.S. ....., 100 S. Ct. 318 (1979). As argued above, *Kaiser Aetna* stresses, in finding a taking, the actual physical invasion of the lagoon by the public resulting from the government's enforcing a navigational easement created by regulation. In contrast, *Andrus* found no compensable taking, even though the regulations there prohibited any commercial resale of the Indian artifacts in question, on the ground that the owners had not lost physical possession. This Court stressed that, though the right of resale might indeed be substantial, the owners retained most of the other rights comprehended in ownership of property. *Id.* at 327. Although *Andrus* concerned personal property, the decision is based upon *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978) and its reasoning.

D. ZONING COMBINING OPEN-SPACE WITH RESIDENTIAL USE DOES NOT EFFECT ANY PHYSICAL INVASION OF PRIVATE PROPERTY.

One might fairly interpret *Penn Central* as rejecting implicitly any contention that a violation of the Constitution occurs by virtue of a land-use regulation which preserves, for the enjoyment of the public, open views through the airspace above designated historical landmark property. This interpretation defeats another misconception of appellants here. It is misleading to suggest that, because the public may enjoy an unimpeded view of the natural landscape or of an historical monument or of any aesthetically pleasing natural or man-made object, government has physically taken private property. Yet, in the experience of City, that is an all too familiar attack upon open-space regulations adopted pursuant to California statute. The case now before this Court offers another specious example.

Appellants argue that they have lost a "right of user" as a result of Tiburon's ordinance, insofar as it requires open-space use. They imply, but do not dare to argue expressly, that the public has acquired an equivalent right to use the property; that is, to enter onto it and physically enjoy it. No such thing has happened or will happen. Tiburon's ordinance does not contemplate any required dedication of public trailways through the property in connection with its development. Rather, the ordinance preserves the utmost flexibility in choosing methods of assuring open-space use in conjunction with the permitted residential use. Ordinance 123 N.S. § 2 JSA, pp. 30-31. The ordinance does not equate "open" with "empty" or "vacant" or "bare," though Agins would imply otherwise. In truth, the ordinance contemplates a landscape filled with natural growth, geological formations, artful landscaping and, most importantly, some residential (and accessory) uses. Open-space zoning does not mean scorching the earth.

Unless one is sufficiently romantic to believe that to see is to use and possess, one cannot equate an open-space regulation with a public use. *Friedman v. City of Fairfax,* 81 Cal.App.3d 667, 677, 146 Cal.Rptr. 687 (1978). The authorities cited by appellants concerning the so-called "right of user" concern mainly physical invasion and property damage affording recovery on a theory of inverse condemnation. *See* Appellants' Brief, pp. 22-23.

One California appellate court has offered a trenchant response to such attacks on open-space regulation. In *Viso v. State of California,* 92 Cal.App.3d 15, 154 Cal.Rptr. 580 (1979), the local agency rezoned the landowner's property as "general forest." In denying relief through inverse condemnation, the appellate court observed that, under the regulation, the landowner still had the right to make use of the property as, for example, a private campground. *Id.* at 24. In short, he could charge members of the public a fee for admission. No matter how great the benefit received by the public in the form of its enjoying tall trees, fresh air, and deep-forested mountainsides, the landowner had not lost his right to control access to and use of his property. To invoke the time-honored symbol mentioned in this Court's opinion in *Andrus v. Allard,* most of the sticks in the landowner's bundle of rights remain in his own hands.

III. The California Supreme Court's Decision Leaves Invalidation As the Appropriate and Substantial Remedy for an Invalid Regulation.

The California Supreme Court confirmed that it will not tolerate violations of the California and United States Constitutions in the form of uncompensated takings of private property. But that court also decided that eliminating the source of the violation, through invalidation of the challenged regulation, is the appropriate remedy available to the landowner in California courts.

Appellants portray invalidation as a sham remedy. Disregarding the fact that the California courts have effectively applied that remedy *e.g., Kissinger v. City of Los Angeles,* 161 Cal.App.2d 454, 327 P.2d 10 (1958), appellants have no difficulty in predicting that local legislatures will find devilish ways to abuse the remedy, while the courts will be conscripted into service as boards of zoning appeals. This Court should not overrule the California court on the basis of such unverifiable, dire predictions.

It is difficult to understand why appellants fear that local legislatures will, after judicial invalidation, simply re-enact an ordinance in slightly different form, but with essentially the same confiscatory effect. No one gladly risks affronting a court, especially not a local legislator receiving the advice of his public attorney. Given the sheer volume of proposed legislation before them, local legislators likewise would not gladly waste their time re-enacting an ordinance certain to be invalidated once again in court.

At bottom, appellants are really suggesting that, having once passed an invalid ordinance, the local legislature will do it again and again, out of innate perversity. The short response to that suggestion is that the legislature is not a council of diabolical powers, but rather the representative body of the people within a democratic government. Landowners also vote in local elections. Their political remedy is one well known to them.

The remedy of invalidation is preferable to a monetary remedy which, in effect, forces local government either to permit the particular development project most desired by the landowner or to purchase land at a price based upon its full potential value through development. In reality, the monetary remedy is the ultimate weapon in

the landowner's arsenal. It is he who applies to the local agency for development; it is he who elicits responses, all too often easily misinterpreted later in court, from local planning officials. It is he who shapes the factual record on which a court later determines a compensable taking has occurred. If government has the means for oppression within its police power, the landowner has the ability to lay ambush through his strategic solicitation of governmental action.

City now will take the liberty of offering its own prediction on the effect of leaving invalidation as the chief remedy for regulatory takings:

1. The volume of land-use litigation in the California courts will be reduced. (The impact on the federal courts will depend upon the decision on this appeal.)

2. Only the meritorious cases will be litigated. Those intended mainly to intimidate local government will become fewer.

3. The courts will have a far more satisfactory factual record on which to proceed, because most cases will arise after the regulation is applied by the local agency. A landowner who can profit only by completing some project has a great incentive to apply first to the local agency.

4. Because declaratory relief and mandate proceedings receive expedited treatment, the landowner will experience less delay and smaller interim expense during the entire period from administrative application to judicial resolution.

5. Compromise, flexibility, and creativity will emerge at both the administrative and judicial levels.

Perhaps the most meaningful example of California's invalidation remedy appears in *Furey v. City of Sacramento,* 24 Cal.3d 864, 598 P.2d 844, 157 Cal.Rptr. 684 (1979), a case in which this Court has already denied the landowner's appeal, *sub nomine Webber v. City of Sacramento,* .... U.S. ...., 100 S. Ct. 476 (1979). In *Furey* the California Supreme Court sustained dismissal of a cause of action for inverse condemnation, challenging an open-space rezoning, based upon its earlier decision in *Agins.* But *Furey* contained a second issue: the landowner's payment of special assessments to a sanitary district for a sewage-treatment system which would prove useless to his land if it remained agricultural.

In granting equitable relief, the California Supreme Court indicated that the special assessments on the land might be reduced and refunded so as to return, in monetary form, the burden of assessments for which the landowner had not received any corresponding benefit. The court noted that the landowner had paid almost one-third of all the assessments levied by the district. In effect, he had financed a public facility enjoyed only by others in the district. Alternatively, the court suggested invalidation of local government's open-space zoning as applied to the property, on the ground that the zoning would preclude the landowner from availing himself of the benefits for which he had paid. Above all, the California Supreme Court, without controlling precisely the exercise of local legislative powers, strove to achieve fair and equitable treatment for the landowner. Flexibility and practicality are the hallmarks of the decision in *Furey.*

V. The Distribution of Burdens Imposed by Land-Use Regulations Need Not Take the Form of Cash Payments Out of the Public Treasury to Individual Landowners.

Regulation under the police power of local government should serve to procure some benefit for the public at large. Yet the public, however much its income and property may be taxed, pays no money for each such benefit received from a local regulation. The very idea of taxing a citizen for clean air and open vistas seems ridiculous. And no less ridiculous, appellants might object, would be the idea of taxing a residential developer for the benefit of permitting commercial uses (for instance, a grocery store) near his project.

Yet appellants seriously argue that the corresponding burdens of land-use regulations, when they fall too heavily upon a single landowner, should be redistributed among the public at large by disbursing money from the public treasury and paying it to the landowner. This argument mistakes the very medium in which the benefits and burdens of land-use regulations flow amongst the citizens. One suffers a restriction on one's property because, under the comprehensive scheme of regulation other properties suffer other restrictions conferring different benefits upon other landowners. We are in the realm of social values, where money is not the medium of exchange.

The scheme may admittedly be imperfect. But the courts properly leave its adjustment and correction to the local legislature. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394-95 (1926).

The benefits conferred by land-use regulation are not "luxuries", as appellants call them. It is simplistic to argue that government should be forced to pay for the benefits obtained through its land-use regulations, or else abandon such regulation altogether. Government is not an ordinary

consumer who may, in hard times, have to forego four ounces of butter in order to buy a few slices of bread. Conserving natural resources, decreasing urban congestion and pollution, rationally locating and diversifying land uses —such needs are not commodities to be classified as luxury items. Rather, they compose the public health, safety, and welfare to which land-use regulation addresses itself.

The citizens of California have not yet told its Legislature that they no longer desire to preserve the State's land resources and assure a healthful environment. Until they deliver that message through political processes to the Legislature, or until the Legislature discovers a better way to promote those objectives than through local regulation, the cities of California cannot simply decide to regulate land uses no more and to let private enterprise and natural forces do what they may to the environment and to each other. Indeed, that *laissez-faire* approach in prior decades may have contributed to the environmental and conservation problems we now experience.

Perhaps we all are "over-regulated." But to rail against regulations simply because there may be too many of them, or because they make private enterprise more costly, is not to offer an enlightened analysis or a practical alternative.

Nor is it true, as appellants argue, that invalidation will pull apart the entire fabric of land-use regulation, thereby crippling local government. The courts know how to limit the scope of their orders; and local legislatures know how to correct defects in their ordinances. Thus the conclusion which appellants would reach—that the availability of money damages affords greater flexibility to local government—does not follow. Government can always decide, voluntarily, to purchase private property. The question here is whether the courts should force such a purchase, instead

of simply invalidating. The answer is that the legislature should control the expenditure of public funds. There remains a qualitative difference between executing a graceful dive into the pool or simply being toppled.

Both as a matter of comity and practicality, the federal courts should not interfere with local autonomy over land-use regulation. The very diversity of this nation's topography and climate virtually precludes any other system of land-use control.

One wonders what the future of private property in this nation will be if government must pay money for every intangible benefit procured for the public at large through land-use regulation. Upon analysis, one may reach some absurd conclusions. If forced to purchase all property, and every right of use of property, from which the public generally receives a benefit, local government would systematically erode its own real property tax base. Thus, even if government had enough money to begin such a program of acquisition, it would soon consume its own fiscal resources. Indeed, one could predict an even more radical result: In the face of the astronomically high cost of purchasing all such public benefits, government might rationally choose instead simply to eliminate by *fiat* all private land-holdings within its jurisdiction. The term commonly used is "to nationalize". That, indeed, would create a question of constitutional dimensions; and the question in turn might be answered in a further amendment to the Fifth Amendment.

CONCLUSION

The decision of the California Supreme Court is consistent with substantive law under the Fifth Amendment. Nothing in that law requires the remedy of inverse condemnation for excessive land-use regulation. Indeed, the judicial remedy of invalidation affords the most fair, efficient, and substantial means of adjusting the rights of government and those of landowners within the context of the modern urban environment. It should not be forgotten that landowners, whether or not they are litigants, also belong to the class of citizen-taxpayers.

For all of the foregoing reasons, *amicus curiae* City respectfully urges this Court to affirm the decision below.

Respectfully submitted,

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APPENDIX "B"

Although Rule 42 permits submission of 'his *amicus* brief of City of San Jose by its authorized law officer, City Attorney Robert J. Logan, without the written consents of the parties, *amicus* City has solicited and obtained consents from the parties nonetheless, so as to assure compliance and advise the parties of City's interest. Those consents are included in Appendix B to this brief.

[Letterhead]

February 12, 1980

Robert J. Logan, Esq.
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Re: Agins v. City of Tiburon
United States Supreme Court—No. 79-602

Dear Mr. Logan:

This is in response to your request for my consent to your filing a brief *amicus curiae* in the above-captioned case now pending before the United States Supreme Court. On behalf of the attorneys for the Appellants in that case, I hereby give such consent.

Very truly yours,

JOHN P. POLLOCK
for Pollock, Williams & Berwanger

JPP:jb

cc: Gideon Kanner, Esq.
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City Attorney
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From.....to.....
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[Letterhead]

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Re: Agins v. City of Tiburon
United States Supreme Court # 79-602

Dear Mr. Logan:

In response to your request for consent to file a brief *amicus curiae* in the above, please be advised that I hereby consent on behalf of the Appellee, City of Tiburon.

Very truly yours,

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FOR ARGUMENT

Supreme Court, U.S.
FILED
MAR 24 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,
Appellants,
vs.
CITY OF TIBURON,
Appellee.

Brief of Amicus Curiae State of California, Acting by and Through the California Coastal Commission, the San Francisco Bay Conservation and Development Commission, and the California Tahoe Regional Planning Agency

Appeal from the Supreme Court of California

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,
Appellants,

vs.

CITY OF TIBURON,
Appellee.

Brief of Amicus Curiae State of California, Acting by and Through the California Coastal Commission, the San Francisco Bay Conservation and Development Commission, and the California Tahoe Regional Planning Agency

Appeal from the Supreme Court of California

This Honorable Court has noted probable jurisdiction of an appeal in this case from the judgment of the Supreme Court of California. This amicus curiae brief is respectfully submitted by the State of California in support of the appellee City of Tiburon, by and through its Attorney General, and acting at the request of the California Coastal Commission, the San Francisco Bay Conservation and De-

velopment Commission, and the California Tahoe Regional Planning Agency.[1]

INTEREST OF THE STATE OF CALIFORNIA

The California Coastal Commission, the San Francisco Bay Conservation and Development Commission, and the California Tahoe Regional Planning Agency, the agencies of the State of California at whose request this brief has been filed, have extensive regulatory authority over the proposed use and development of land and water areas within their respective jurisdictions. Protection of the natural resources and environment of the California coastline, of San Francisco Bay and of the California portion of the Lake Tahoe Basin is a paramount objective for these agencies. E.g., *CEEED v. California Coastal Zone Conservation Commission, supra,* 43 Cal.App.3d 306; *People ex rel. S.F. Bay Con. etc. Com. v. Town of Emeryville* (1968) 69 Cal.2d 533. California's actions taken by these agencies to promote

1. The California Coastal Commission is an agency of the State of California, charged with the duty of developing and enforcing plans for the permanent protection and restoration of the California coastline. Calif. Public Resources Code §§ 30000 et seq. The Commission and its functions are the outgrowth of an extensive planning and regulatory process mandated by the People of California in an initiative adopted in 1972. The constitutionality of that planning and regulatory process has been upheld against constitutional attack. *CEEED v. California Coastal Zone Conservation Commission* (1974) 43 Cal.App.3d 306. The San Francisco Bay Conservation & Development Commission is also a public agency of the State of California. Calif. Government Code §§ 66600 et seq. One of the Commission's main purposes is to provide permanent protection for the San Francisco Bay and its shoreline. The Commission's enabling legislation has likewise been upheld against constitutional attack. *Candlestick Properties, Inc. v. San Francisco Bay Conservation etc. Com.* (1970) 11 Cal.App.3d 557. The California Tahoe Regional Planning Agency exercises planning and regulatory authority over the California portion of the Lake Tahoe Basin. Calif. Government Code §§ 67000 et seq. It too is engaged in litigation where landowners have asserted that its regulatory actions constitute a taking of property.

the objective of protection of natural resources have resulted in litigation where landowners have charged that the effect is to have inversely condemned their properties. E.g., *State of California v. Superior Court* (1974) 12 Cal.3d 237; *Candlestick Properties, Inc., supra,* 11 Cal.App.3d 557. The Coastal Commission alone, for example, is engaged in inverse condemnation litigation in which the monetary claims total more than $150,000,000. The California Tahoe Regional Planning Agency is engaged in similar litigation, with claims of more than $100,000,000.

In such cases, the agencies have consistently contended that their regulatory actions, taken pursuant to their respective enabling laws, constitute appropriate exercises of the police power; if they have improperly exercised that power, the remedy is invalidation of the action, rather than an award of damages to the afforded landowner. The issues in this case are thus of critical importance to them, and the State of California therefore respectfully requests that its contentions be considered in this case.

SUMMARY OF ARGUMENT

1. The appellants assert that the California Supreme Court decision must be reversed, since the City's ordinances *as applied* prevent any viable economic use of their land. Juris. St. 28; App. Brief 7.[2] They claim that the California Court "ignored the allegation of the Complaint that, *as*

2. Some of the appellants' amici make the same claim: "[t]his case . . . presents this Court with the issue of whether a landowner is entitled to his day in court with the opportunity to prove that regulations, which on their face appear to be valid, may in fact be invalid *when applied* to his property." National Association of Manufacturers Brief 3 (emphasis added). "[T]he challenge to and the allegation of 'taking' arises not from the face of ordinance but from *effects* of the actions of governmental body and the *effect* of the regulatory restrictions on the property . . ." San Diego Gas & Electric Brief 14.

applied to their property the zoning was confiscatory." App. Brief 9 (emphasis added); see Juris. St. 9. They emphasize that "[t]he allegations at bench are that the large-lot zoning involved here, [fn. omitted] has deprived the subject property of all utility and value." App. Brief 23.

Those claims are not properly before the Court. The California Supreme Court authoritatively construed the City's ordinances as permitting as a matter of right the construction of at least one residence on the appellants' property. J. S. A. 3, 13. The ordinances further permit the possible construction of up to five residences on the property, after application by the landowner and consideration by the City. *Id.* However, the appellants have never sought such approval.

Under these circumstances, the California Supreme Court properly considered only the validity of the ordinances on their face; the validity of the ordinances *as applied* cannot be determined unless and until the appellants seek approval from the City. The only question properly before the Court is therefore whether the ordinances permitting the construction of one residence as a matter of right, and perhaps up to five residences, facially constitute a taking of property.

2. California law requires each city and county to adopt comprehensive plans designed to ensure the appropriate, balanced and controlled growth of the state. As part of each such plan, cities and counties are required to adopt open space elements; those elements require the cities and counties to protect natural resources and provide against the deleterious effects of urban sprawl. The City's ordinances involved in this case were adopted as part of these requirements, as were other City ordinances dealing with other required subjects, including housing.

The ordinances applicable to the appellants' property seek to provide "for the reasonable use of open space land, while at the same time preserving and protecting its open space characteristics." They do not, and cannot under California law, prohibit all reasonable use of the property. The goal of the ordinances, the preservation of natural resources and open space, is a permissible governmental goal, and may be achieved not only by eminent domain, but by regulation: the fact that a regulatory measure is enacted to serve such a public interest does not mean that it amounts to a public use requiring compensation.

3. The restrictions imposed by the ordinances do not constitute a taking of property. They permit one residence on the property as a matter of right. Depending upon the nature of the property, geological restraints and the property's resource characteristics, and depending upon the form in which development is proposed, the ordinances permit up to five residences. The contrary allegations of the complaint were therefore properly ignored by the California Supreme Court.

4. Moreover, even assuming that the ordinances constitute a taking of the appellants' property, the appropriate remedy is invalidation of the ordinances rather than an award of damages. An award of monetary damages for a regulatory action which constitutes a taking is appropriate only where the regulating agency has affirmatively determined to exercise its eminent domain power and is authorized to make that determination. The City of Tiburon has not so determined, and the California Legislature has forbidden the taking of property without compensation by means of open space ordinances. Monetary damages in this case would thus effectively transfer the power of eminent

domain from the appropriate legislative bodies to the judiciary.

In addition, an award of monetary damages under these circumstances would paralyze land use regulatory agencies throughout the United States. Given the appellants' position that the intent of the regulating entity is irrelevant in determining whether a constitutional violation has occurred and that the only significant question is whether a taking has in fact occurred, only the bravest legislator or regulator will venture more than the mildest and most ineffectual form of land use controls. For these reasons, the appellants' position should be rejected.

I. A Determination of the Constitutional Questions Raised by This Case Must Be Limited to the Effect of the Ordinances on Their Face. The California Supreme Court Lacked Jurisdiction to Consider the Effect of the Ordinances as Applied. This Court Should Not Consider the Effect of the Ordinances as Applied Since No Application for a Permit Was Ever Made or Decided.

In 1973, the City adopted two zoning ordinances which had the effect of rezoning the five-acre property of the appellants, among others, to a RPD-1 zone. J. S. A. 28-46. Among the uses permitted in such a zone are "one-family dwellings." J. S. A. 31. The appellants' complaint alleged that they acquired their property for such residential purposes, and that such uses were the highest and best use of the land. J. A. 4. The permissible density of residences under the zoning ordinance is "not less than .2 nor more than 1 dwelling unit per gross acre . . ." J. S. A. 32. The California Supreme Court construed the ordinance:

> "As applied to plaintiffs' five acres 'RPD-1' zoning means a maximum of five dwelling units or a minimum of one. Whether plaintiffs are permitted to build five dwelling units, or fewer, will depend upon the particular architectural design contemplated and the results of the required environmental impact report." J. S. A. 3.[3]

As the California Court also recognized, however, the appellants "have never made application to use or improve their property following Tiburon's adoption of Ordinance No. 124 N.A., nor have they either sought or received any definitive statement as to how many dwelling units they could build on their land." J. S. A. 3. Whether they would be limited to only the one dwelling unit permitted as a matter of right by the ordinance, or whether they would be permitted to develop their property with two, three, four or five dwelling units thus cannot be known in this litigation. Under these circumstances, their claim that the California Supreme Court "ignored the allegation of the Complaint that, as applied to their property, the zoning was confiscatory" must fall. App. Brief 9. How the ordinance might actually be applied is purely speculative; a determination of constitutionality in this case must therefore be limited to the validity of the ordinance on its face. We believe this is so, for two distinct reasons.

A. THE CALIFORNIA SUPREME COURT LACKED JURISDICTION TO DETERMINE THE VALIDITY OF THE ORDINANCE AS APPLIED, DID NOT DETERMINE SUCH VALIDITY, AND THAT QUESTION THUS IS NOT PROPERLY BEFORE THE COURT

The California cases have consistently reiterated the rule that the California courts do not have jurisdiction to determine an action unless the party seeking relief has first

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3. Amicus Half Moon Bay Properties strenuously objects to the California Supreme Court's interpretation of the ordinance and offers its own reading. Brief 6-10. The California Court's interpretation is, of course, a final and binding interpretation of state law which controls here. "Whether decided well or otherwise by the State court, we have no authority to inquire." *Murdock v. City of Memphis* (1875) 20 Wall. 590, 638.

exhausted his administrative remedies. *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280; *City of Susanville v. Lee C. Hess Co.* (1955) 45 Cal.2d 684. Unlike the federal exhaustion rule, the doctrine of exhaustion of administrative remedies is a fundamental rule of jurisdiction in California. *Abelleira v. District Court of Appeal, supra*; *Clark v. Personnel Board* (1943) 61 Cal.App.2d 800; *Morton v. Superior Court* (1970) 9 Cal.App.3d 977, 981.[4]

This rule applies to actions raising a claim of inverse condemnation. In *Metcalf v. County of Los Angeles* (1944) 24 Cal.2d 267, the Court refused to entertain a constitutional challenge to a zoning ordinance as applied, until a permit application had been made to the County. As the Court explained, " 'the legislative process remains incomplete' " until such an application is made and considered, and judicial intervention prior to that time is jurisdictionally impermissible. 24 Cal.2d at 27; *accord*: *Pan Pacific Properties, Inc. v. County of Santa Cruz* (1978) 81 Cal. App.3d 244, 249-251; *People v. Superior Court (Tidwell)* (1979) 91 Cal.App.3d 95; *Igna v. City of Baldwin Park* (1970) 9 Cal.App.3d 909; *Dunham v. City of Westminster* (1962) 202 Cal.App.2d 245.

In the California courts, the City of Tiburon argued these principles: it contended that the courts lacked jurisdiction to consider the appellants' claim, because they had never applied for a permit under the zoning ordinance. Respondent's Brief (California Court of Appeal) 17-19; Petition for Hearing (California Supreme Court) 2-8. The California Supreme Court opinion nonetheless does not explicitly mention an exhaustion requirement. However,

4. Amicus Half Moon Bay Properties, Inc., has conceded this California jurisdictional rule. Brief 24. While some of the other amici states may vary as to the jurisdictional nature of the rule, it is a significant rule of general application.

the method of analysis utilized by the Court makes it apparent that that well understood California rule in fact underlies its decision. As the appellants suggest, the Court "ignored the allegation of the Complaint that, as applied to their property the zoning was confiscatory" (App. Brief 9, n. 2), since that question could not properly be before the Court: the failure of the appellants to seek a permit jurisdictionally precluded consideration of that question. As the appellants also suggest, however, the Court did state "that the ordinance on its face purported to give some economic use to their property." *Id.* In light of the failure of the appellants to seek a permit, that was the only question which *could* jurisdictionally be considered.

This construction of the California Supreme Court opinion is compelled by *Pan Pacific Properties, Inc. v. County of Santa Cruz, supra,* 81 Cal.App.3d 244. The landowner in that case asserted that a County's zoning ordinance constituted a taking of property. The ordinance, like the ordinance here, permitted the construction of at least one residence on the property. 81 Cal.App.3d at 251 and 255. The California Court of Appeal first held that the failure of the landowner to seek a permit under the ordinance jurisdictionally precluded consideration of the constitutional claim. 81 Cal.App.3d at 251. The Court nonetheless considered the merits of the claim that the ordinance *on its face* constituted a taking of property. 81 Cal.App.3d at 253-256. The Court held that the ordinance on its face did not constitute a taking of property, since it conferred the ability to construct one residence on the property as a matter of right. *Pan Pacific* thus explicitly articulates, in a jurisdictional context, the principles which underlie the *Agins* decision.

The California jurisdictional rule relating to exhaustion of administrative remedies and claims of inverse condem-

nation is thus well established. The appellants' position here is one which was not and jurisdictionally could not have been considered by the California Supreme Court. Since the California courts were without jurisdiction to determine the question whether the ordinance as applied constituted a taking of the appellants' property, this Court likewise is without jurisdiction to consider the claim. Decision here must therefore be limited to the validity of the ordinance on its face.

B. SOUND JURISPRUDENTIAL CONSIDERATIONS COMPEL THE CONCLUSION THAT THIS COURT SHOULD NOT CONSIDER THE VALIDITY OF THE ORDINANCE AS APPLIED, SINCE NO APPLICATION FOR A PERMIT WAS EVER MADE OR DECIDED

Even assuming that the California Supreme Court had jurisdiction to decide the validity of the ordinance as applied, this Court should decline to determine the constitutional questions which may be raised by its application. In the absence of a request for a permit by the appellants and in the absence of a decision by the City specifying the extent of use permissible on the appellants' property, such a determination would be purely speculative and advisory.

This Court has consistently refused to decide constitutional questions unless necessary and unless ripe for adjudication. As Mr. Justice Frankfurter has explained:

> "Courts do not review issues, especially constitutional issues, until they have to. [Citations omitted]. In part, this practice reflects the tradition that courts, having final power, can exercise it most wisely by restricting themselves to situations in which decision is necessary. In part, it is founded on the practical wisdom of not coming prematurely or needlessly in conflict with the executive or legislature." *Joint Anti-Fascist Refugee Committee v. McGrath* (1951) 341 U. S. 123, 154-155 (Frankfurter, J., concurring).

As he has further explained:

> "[T]he adjudicatory process is most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issues a practical necessity . . . . These considerations press with special urgency in cases challenging legislative or state judicial action as repugnant to the Constitution. 'The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity.'" *Poe v. Ullman* (1961) 367 U.S. 497, 503.

The Court has also noted that "[m]erely potential impairment of constitutional rights under a statute does not of itself create a justiciable controversy in which the nature and extent of those rights may be litigated." *Communist Party v. Subversive Activities Control Board* (1961) 367 U. S. 1, 71; *W. E. B. DuBois Clubs v. Clark* (1967) 389 U. S. 309. Here, the appellants' case does not present a ripe controversy, since it depends on the "concurrence of . . . contingent events . . . too speculative to warrant anticipatory judicial determinations." *Eccles v. Peoples Bank* (1948) 333 U. S. 426, 432. A ruling on the constitutional validity of the statute *as applied* must depend upon the uncompleted legislative process of the City of Tiburon (*Metcalf v. County of Los Angeles, supra,* 24 Cal.2d 267, 271), and upon the questions which may emerge from an application for a permit under the City's zoning scheme, the City's ultimate decision and the reasons for its action. "Rulings on these questions would plainly be rulings upon 'hypothetical situations that may or may not [arise].'" *Regional Rail Reorganization Act Cases* (1974) 419 U. S. 102, 146; *Toilet Goods Association v. Gardner* (1967) 387 U.S. 158, 163; *Eccles v. Peoples Bank, supra,* 432.

These sound jurisprudential considerations have also been consistently applied in cases involving local zoning ordinances; indeed, they are reflected in this Court's *corpus juris* from the earliest to the most recent expressions on the constitutional validity of land use regulations. In *Euclid v. Ambler Realty Co.* (1927) 272 U. S. 365, the Court upheld a comprehensive zoning ordinance against a claim of taking. Because the ordinance had not yet been enforced against the landowner, however, the Court declined to decide its constitutionality as applied:

> "It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises . . . some of them, or even many of them, may be found to be clearly arbitrary and unreasonable. But where the equitable remedy of injunction is sought, as it is here, not upon the ground of a present infringement or denial of a specific right, or of a particular injury in process of actual execution, but upon the broad ground that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values and curtailing opportunities of the market, constitute a present and irreparable injury, the court will not scrutinize its provisions, sentence by sentence, to ascertain by a process of piecemeal dissection whether there may be here and there, provisions of a minor character, or relating to matters of administration . . . which, if attacked separately, might not withstand the test of constitutionality. . . .
>
> "And this is in accordance with the traditional policy of this Court. In the realm of constitutional law, especially, this Court has perceived the embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be fitted. This process applies with peculiar force to the solution of questions arising under the due process clause of the Constitution, as applied to the exercise of the flexible powers of police, with which we are here concerned." 272 U. S. at 395-397.[5]

In *Penn Central Transportation Co. v. New York City* (1978) 438 U. S. 104, the Court reached a similar result. There, the landowner asserted that it had been prohibited completely from utilizing the airspace above Grand Central Terminal. Although the pertinent governmental agency had refused to permit the construction of a 50-story building above the Terminal, it had also "emphasized that whether any construction would be allowed depended upon whether the proposed addition 'would harmonize in scale, material, and character with [the Terminal].'" 438 U. S. at 137. The Court pointed out that "[s]ince appellants have not sought approval for the construction of a smaller structure, we do not know that appellants will be denied any use of the portion of the airspace above the Terminal." *Id.* The rationale of *Penn Central* is equally applicable here: the appellants have never sought a permit for construction of more than the one residence which the Tiburon ordinance permits as a matter of right; the extent of additional construction which the City may or may not permit depends upon the application of the criteria specified in its zoning ordi-

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5. The Court reached the same result in *Allen v. Grand Central Aircraft Co.* (1954) 347 U. S. 535, 553, involving, *inter alia*, a claim that a federal act and administrative proceedings under it violated the Fifth Amendment by taking the appellee's property. The Court replied that "it would be premature action on our part to rule upon these until after the required administrative procedures have been exhausted."

nances. Under these circumstances, the validity of the ordinance *as applied* cannot properly be decided by the Court.

The rationale for requiring full and final consideration by an appropriate administrative body before the Court will decide constitutional questions has further been explained. In *Moore v. East Cleveland* (1977) 431 U. S. 494, Chief Justice Burger stated:

> "[I]f administrative remedies are pursued, the citizen may win complete relief without needlessly invoking judicial process.[6] This permits the parties to resolve their disputes by relatively informal means far less costly and time consuming than litigation. By requiring exhaustion of administrative processes the courts are assured of reviewing only final agency decisions arrived at after considered judgment . . . . Consistent failure by the courts to mandate utilization of administrative remedies—under the growing insistence of lawyers demanding broad judicial remedies—inevitably undermines administrative effectiveness and defeats fundamental public policy by encouraging 'end runs' around the administrative process.
>
> "... [N]o one has a right to a federal constitutional adjudication on an issue capable of being resolved on a less elevated plane. Indeed, few concepts have had more faithful adherence in this Court than the imperative of avoiding constitutional resolution of issues capable of being disposed of otherwise .... [S]o long as favorable administrative action is still possible, the policies favoring exhaustion are not mitigated in the slightest by the presence of a constitutional issue." 431 U. S. at 525-527 (Burger, C. J., dissenting).

The observations of the Chief Justice are confirmed by this case. The appellants contend that their challenge to

6. *Accord: Aircraft & Diesel Corp. v. Hirsch* (1947) 331 U.S. 752, 767-768.

the validity of the ordinance as applied is "heavily dependent on factual evidence (including expert testimony by engineers, appraisers and land economists)." App. Brief 14. The appellants thus apparently ask the Court to reach a result which would simply ignore the proper role of the City of Tiburon in the regulatory process, prematurely transfer that process to the judicial system, and then ask either a court or jury to resolve various technical questions of extraordinary complexity, including the extent to which additional development *might* be authorized by the City.[7]

Opinions often vary as to the possibility of gaining approval of proposed development and as to the result which the regulatory agency may ultimately reach, and it is not surprising that some witnesses can almost always be found who will testify that the agency involved will not approve specific forms of development. Such testimony puts the agency in the untenable position of offering limited countervailing testimony that approval *might* be given; the agency, however, can hardly be expected to offer concrete evidence that a discretionary approval *would* be given, since neither it nor its members have been presented with specific development proposals nor allowed to engage in the normal analysis it would undertake prior to a decision on approval. For example, in many cases, a commitment as to use by a California public agency would be improper without public hearings, prior consideration of specific development plans, and an environmental impact report. J. S. A. 3; Calif. Public Resources Code §§ 21000 et seq. Acceptance of the appellants' position would thus transfer administrative land use

7. This claim is no hyperbole. It is exactly what occurred in *San Diego Gas and Electric Co. v. City of San Diego,* now pending before this Court on appeal as No. 79-678. It is also what some of the appellants' amici have argued in cases against the State of California and its agencies.

processes to the courts, for trials which can amount to no more than sheer speculation.[8]

But the rationale of avoiding constitutional adjudication until a final agency decision has been reached is precisely to eliminate speculation and inferential conclusions as to what the actual effect of an ordinance is. Until the agency process is complete, the courts must necessarily speculate as to the ultimate outcome of decisions which are institutionally entrusted to other agencies of government. Unless application to the local government is required, the government is also deprived of an opportunity to fully develop the facts and apply its specialized expertise. In such situations, the Ninth Circuit has said that there is no case or controversy until the administrative process is complete. *Sea Ranch Association v. California Coastal Zone Conservation Commission* (9th Cir. 1976) 537 F.2d 1058; *Craycroft v. Ferrall* (9th Cir. 1969) 408 F.2d 587. Until that process is complete, any determination of what uses might ultimately be permitted is necessarily only speculation—and speculation is hardly an appropriate basis on which to award the more than $2,000,000 which the appellants seek in this case.

Unless the Court is to determine as a matter of law that a zoning ordinance which allows up to five units on a five acre parcel is unconstitutional on its face, the extent and nature of the relationship between the interests of the

8. We discuss later the paralyzing effect which monetary remedies for a regulatory taking will have on land use regulation. See pg. 44, *infra*. The asserted right of a landowner to proceed to trial where, as here, he has never even sought approval from the regulatory body is but another aspect of that problem. If the appellants' position is accepted, the governmental agency must then bear the tremendous expense of defending such suits which, as we have noted, can only involve speculative proof at best. The regulating body would also be forced to bear the uncertainty that the judgment might ultimately lead to a requirement of compensation for other land use decisions, either made or contemplated.

property owner and those of the public cannot be determined in the absence of a permit application and decision by the City. Since the zoning ordinance of the City guarantees the right to develop at least one unit on the parcel, the alleged taking must have occurred with respect to the remainder of the parcel that could not be developed. But, in the absence of a permit application and decision, the Court lacks the facts to properly assess the relationship of the developable area to the areas that may not be developed and the ultimate relationship of the impact of the regulation and the governmental purpose carried out through the zoning ordinance.

The Court has held that "'taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated" but rather the review of the Court must focus "*both* on the *character* of the action *and* on the *nature* and *extent* of the interference with rights in the parcel *as a whole* . . . ." *Penn Central Transportation Co. v. City of New York, supra,* 438 U. S. at 130-131 (emphasis added). Until the City of Tiburon acts on a permit application, it is impossible to assess the "character" of the governmental action, since both the action itself in specifying the number of allowable units and the findings adopted in support of the decision are essential ingredients in defining the "character" of the public action. Moreover, it is impossible to define either the "nature" or the "extent" of any alleged interference with rights in the parcel as a whole, until the number of units is determined and any possible conditions placed on the development are defined.

The various policies reviewed above are applicable here. They compel the conclusion that the only question properly before the Court is the constitutional validity of the

ordinances on their face. As we will demonstrate below, on their face the ordinances implement reasonable and permissible legislative goals. They also permit reasonable use of the appellants' property. They thus do not constitute a taking of property in violation of the Fourteenth Amendment.

II. California Has a Statutory Program Providing for Balanced and Controlled Growth of the State. As Part of That Program, It Has a Policy of Preserving Open Space In Order to Protect Natural Resources and Against Urban Sprawl. This Program and Policy Are Constitutionally Permissible Objectives. As Part of California's Regulatory Program, Open Space and Protection of Natural Resources May Be Achieved by Regulation, Rather Than Only by Eminent Domain.

This Court has held that "States and cities may enact land-use restrictions or controls to enhance the quality of life . . . " *Penn Central Transportation Co. v. City of New York, supra,* 438 U.S. at 129. In this section of the brief, we will explain that California has required local cities and counties to adopt comprehensive plans for that purpose. Among the elements which must be included in such plans is protection of natural resources and protection against the deleterious effects of urban sprawl, through open space zoning.[9] Other elements seek to provide for

9. California Government Code Section 65561 states:
"The Legislature finds and declares as follows:
(a) That the preservation of open-space land, as defined in this article, is necessary not only for the maintenance of the economy of the state, but also for the assurance of the continued availability of land for the production of food and fiber, for the enjoyment of scenic beauty, for recreation and for the use of natural resources.
(b) That discouraging premature and unnecessary conversion of open-space land to urban uses is a matter of public interest and will be of benefit to urban dwellers because it will discourage noncontiguous development patterns which unnecessarily increase the costs of community services to community residents.
(c) That the anticipated increase in the population of the state demands that cities, counties, and the state at the earliest possible date make definite plans for the preservation of valuable open-space land and take positive action to carry out such plans by the adoption and strict administration of laws, ordinances, rules and regulations as authorized by this chapter or by other appropriate methods.
(d) That in order to assure that the interests of all its people are met in the orderly growth and development of the state and the preservation and conservation of its resources, it is necessary to provide for the development by the state, regional agencies, counties and cities, including charter cities, of statewide coordinated plans for the conservation and preservation of open-space lands.
(e) That for these reasons this article is necessary for the promotion of the general welfare and for the protection of public interest in open-space land."

California Government Code section 65562 further declares:
"It is the intent of the Legislature in enacting this article:
(a) To assure that cities and counties recognize that open-space land is a limited and valuable resource which must be conserved wherever possible.
(b) To assure that every city and county will prepare and carry out open-space plans which, along with state and regional open-space plans, will accomplish the objectives of a comprehensive open-space program."

other substantial needs of California's population, including housing. Together, such plans, their mandatory elements, and their implementing zoning ordinances are the means for ensuring the appropriate, balanced and controlled growth of California. The City's ordinances here were adopted as part of this planning and regulatory process. These are permissible and constitutional regulatory goals, and do not require an exercise only of the eminent domain power for their achievement.

Under California law, all land use restrictions are necessarily controlled by a comprehensive general plan which

must be prepared by each City and County. Calif. Gov. Code § 65300. The California Legislature has mandated that "the general plan and elements and parts thereof comprise an integrated, internally consistent and compatible statement of policies for the adopting agency." Calif. Gov. Code § 65300.5.

The general plan must include a number of various elements. These elements are various policies and provisions dealing with land use, traffic circulation, housing, conservation, seismic safety, noise, open space, scenic highways and safety. Calif. Gov. Code § 65302. Once the general plan is adopted, with these mandatory elements, all subsequent zoning measures must conform to the general plan. Calif. Gov. Code § 65860. In short, the general plan is intended to be "a constitution for all future development within the city." *O'Loane v. O'Rourke* (1965) 231 Cal.App. 774, 782. The open space element of the general plan, therefore, is simply one of many factors which enters into a City's plan for future development of land within its jurisdiction. As we discuss more fully later, for example, California's Planning and Zoning Law also requires each city and county to make provision for adequate housing of all economic segments of the population. Calif. Government Code § 65302.

In order to carry out the policies of its open space element of the general plan, local governments must adopt a specific "action program". Calif. Gov. Code § 65564. The City's zoning thereafter must be "consistent" with the open space plan. Calif. Government Code § 65566. The ordinances applicable to the appellants' property were enacted as part of this mandatory statutory plan. J. S. A. 28-30; 41-45.

The most significant feature of the open-space provisions of the general plan law is that they are directed

toward the protection of important natural resources. An open space area may not be designated as "open space land" simply because it is undeveloped. Rather, any area designated under an open space plan must be both unimproved *and* an area warranting regulation for resource protection purposes. Under California Government Code section 65560, such areas must meet one of the following four requirements in order to be so designated: (1) "open space for the preservation of natural resources," including wildlife habitat, areas required for scientific study, waterfront lands and watershed lands; (2) "open space for the managed production of resources," including forestry lands, agricultural lands and fisheries resources; (3) "open space for outdoor recreation, including . . . areas of outstanding scenic, historic, or cultural values" and (4) "open space for public health and safety, including . . . areas which require special management or regulation because of hazardous or special conditions such as earthquake zones, unstable soil areas, flood plains" and other similar areas. It is thus clear that the California Legislature has established a statutory scheme, for the purpose of protecting resource values of statewide concern.

Legislative concern with the protection of significant resources has been heightened by the pressures generated by a rapidly urbanizing society and by the need to assure the long-term protection of vital resources. But the source of such authority lies even in the common law. For example. in upholding the constitutionality of the California Coastal Zone Conservation Act of 1972, the California Court of Appeal declared:

> "Most of the recent state laws affecting land use are designed to control or prevent uses harmful to the environment or to the natural resources of the state.

> Such land use controls are premised on the state's traditional power to enact legislation to prohibit or prevent activities which are or may become public nuisances and therefore . . . the nature of the governmental interest differs substantially from that involved in conventional local zoning. . . . Current legislation for environmental and ecological protection constitutes but 'a sensitizing of and refinement of nuisance law.'" *CEEED v. California Coastal Zone Conservation Commission supra,* 43 Cal. App.3d at 313 n. 4 and 319.

This Court in *Penn Central* held that "in instances in which a state tribunal reasonably concluded that 'the health, safety, morals or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land use regulations that destroyed or adversely affected recognized real property interests" and that "a 'taking' may more readily be found when the interference with property can be characterized as a physical invasion . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." 438 U. S. at 124. The resource protection concerns embodied in California's open space planning and regulatory statutes are clearly grounded in the government's authority to prohibit or prevent activities which may cause a public harm, and they therefore constitute such a public program.

It is highly misleading, however, to assert that regulation under these provisions of the Planning and Zoning Law results in "an authorized *acquisition* of a public resource of a park-like nature . . . " App. Brief 27. The statutory provisions focus entirely on preventing urban sprawl, and on protection of natural resources, rather than open space *qua* open space for aesthetic purposes. Neither

do they authorize physical public use of the property. As noted, Government Code section 65561 deals with "assurance of the continued availability of land for the production of food and fiber" (sub. (a)), discouragement of "noncontiguous development patterns which unnecessarily increases the costs of community services to community residents" (sub. (b)), preservation of valuable open-space land because of the demands of "the anticipated increase in the population of the state" (sub. (c)), and assurance that "the interests of all [California's] people [will be] met in the orderly growth and development of the state and the preservation and conservation of its resources . . . ." The City's ordinance reflects these same policies; it emphasizes protection of natural resources and protection against the adverse impact of unsuitable and improper development. J. S. A. 30-35.

Moreover, the requirement of consistency between a city's open space element of its general plan and its zoning does not by any means preclude all practical, beneficial or economic uses of the land so regulated. If, for example, a City designates agriculturally usable lands as open space in the open space plan, and thereafter zones such lands for agricultural uses, there clearly can be both consistency and reasonable economic use. Consistency exists where "the various land uses authorized by the [zoning] ordinances are *compatible* with the objectives, policies, general land uses and programs specified in such a plan." Calif. Government Code § 65860(a)(ii). The City's ordinances here find residential dwellings to be compatible, so long as "maximum effort" has been made to protect the natural resources of the site. J. S. A. 32-33. In *Dale v. City of Mountain View* (1976) 55 Cal.App.3d 101, the Court, for example, noted that uses permitted under the City's open

space designation included, among others, commercial and noncommercial recreation uses and facilities, golf courses, veterinary clinics, kennels, cemeteries and swimming pools. Protection of natural and aesthetic resources under the California Planning and Zoning Law thus emphatically does not require that property be left without any use whatsoever. Indeed, the California Legislature left no room for argument on this point, by its declaration that the provisions of the California Planning and Zoning Law cannot be construed as permitting a local government, through open-space zoning, to take or damage private property for public use without just compensation. Calif. Government Code § 65912. The City's ordinance likewise states that one of its goals is "to permit the reasonable use of open space land, while at the same time preserving and protecting its open space characteristics . . . ." J. S. A. 30.

Preservation of natural resources and protection against the effects of inappropriately placed development "for the promotion of the general welfare and for the protection of the public interest" (Calif. Government Code § 65561(e)), are permissible legislative goals. "States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city." *Penn Central Transportation Co. v. New York City, supra,* 438 U. S. 104, 129. "The police power is not confined to elimination of filth, stench, and unhealthly places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre v. Boraas* (1974) 416 U.S. 1, 9. "It is within the power of the legislature to determine that the community should be beautiful as well as healthy,

spacious as well as clean, well-balanced as well as carefully patrolled." *Berman v. Parker* (1954) 348 U. S. 26, 33.

The appellants nonetheless point to various provisions of California law which indicates that open space lands *may* be purchased by local cities and counties. App. Brief 10, 26. From these provisions, they would conclude that when a local government protects open space and natural resources by open space zoning, the regulation *must* be accompanied by compensation: they contend that government's *power* to exercise eminent domain for open-space and resource protection purposes *a fortiori* characterizes regulation for those ends as "acquisitions of resources to permit or facilitate uniquely public functions." App. Brief 26.

The conclusion is a *non sequitur*. As the Court explained only this term, "'[T]he legislature . . . is authorized to pass measures for the protection of the people . . . in the exercise of the police power, and is itself the judge of the necessity or expediency of the means adopted.'" *Andrus v. Allard* (1979) ..... U.S. ..... (40 C.C.H. Sup. Ct. Bull. p. B163, B171). Moreover, as the California courts have concluded:

> "While a conceived objective of preserving a scenic, historical and singularly desirable open-space resource may result in conferring a public *benefit,* such an otherwise valid purpose and attendant result is not the equivalent of a public *use* requiring compensation." *Friedman v. City of Fairfax* (1979) 81 Cal. App. 3d 667, 677.

"To require compensation in all such circumstances would effectively compel the government to regulate by *purchase.*" *Andrus v. Allard, supra,* (40 C. C. H. Sup. Ct. Bull. p. B177).

The appellants' argument here is thus nothing less than an attack on the entire concept of land use regulation. Since it is clear that most, if not all, of the aims of any land use regulatory program may also be achieved by eminent domain, their definition of public use would require compensation for *all* regulation which in some way diminishes property values.[10] But the fact that a regulatory measure is enacted to serve a public interest does not mean that it amounts to a public *use* requiring compensation. Regulation cannot validly be enacted unless it serves a reasonable public purpose, but the convergence of public interest and public purpose in it does not compel the use of compensation to achieve its ends: regulation is not an appropriation of property by government for its own uses. *Penn Central Transportation Co. v. City of New York, supra,* 438 U. S. at 135. "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every change in the general law." *Pennsylvania Coal v. Mahon* (1922) 260 U. S. 393, 413; *Andrus v. Allard, supra,* (40 C.C.H. Sup. Ct. Bull. p. B177-178). *Penn Central, supra,* 438 U.S. at 124. The appellants' contention must accordingly be rejected.

The Court must therefore conclude that the failure of the City to include a measure of compensation within its

10. Consider the examples utilized by the Court in *Penn Central Transportation Co. v. City of New York, supra,* 438 U.S. at 130. The height restriction upheld in *Welch v. Swasey* (1909) 214 U. S. 91, could also have been achieved by purchase of the air rights. The setback restrictions upheld in *Gorieb v. Fox* (1927) 274 U. S. 603, could also have been achieved by purchase of a public easement over those portions of the property. In *Penn Central* itself, the restriction could equally have been achieved by purchase of the air rights. As the Court noted, however. " '[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated . . . [T]he 'taking' issue in these contexts is resolved by focusing on the uses the regulations permit." 438 U. S. at 130-131.

zoning ordinances does not invalidate the measure. As the Court has concluded, however, the further question must be answered "whether the interference with appellants' property is of such a magnitude that 'there must be an exercise of eminent domain and compensation to sustain [it].' " *Penn Central Transportation Co. v. City of New York, supra,* 438 U. S. at 136. To that question, we turn.

III. The Zoning Ordinances of the City of Tiburon On Their Face Do Not Amount to a Taking of Property.

The complaint in this case does not indicate "what the prior zoning was; nor does it allege that the property was down-zoned; nor does it allege, or set forth facts which indicate how, or in what manner, the modified zoning restrictions are more restrictive than those that previously existed . . ." Motion to Dismiss or Affirm, 2 n. 2.[11] It is thus impossible to determine on this record the diminution in value, if any, caused by the City's zoning ordinances. As the Court has noted, in any event, "the decisions sustaining other land-use regulations, which . . . are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking,' [citations omitted] and that the 'taking' issue in these contexts is resolved by focusing on the uses the regulations permit." *Penn Central Transportation Co. v. City of New York, supra,* 438 U.S. at 131.

As the California Supreme Court explained, the City's ordinances permit one residence on the appellants' property as a matter of right; up to five residences may be permitted, upon application to the City. The ordinances

11. The appellants were afforded an opportunity to amend their complaint, but declined. J. A. 26.

indicate that one of their goals is "to protect and preserve open space land as a limited and valuable resource . . . *and to permit the reasonable use of open space land, while at the same time preserving and protecting its inherent open space characteristics* . . . " J. S. A. 30 (emphasis added). On their face, the ordinances thus do not prohibit all reasonable use of the property, and the California Supreme Court properly rejected the Appellants' assertions to the contrary. J. S. A. 13.

The appellants nonetheless contend that the Constitution requires that they "be afforded a fair chance to prove a taking of [their] property before a trier of fact. App. Brief 15. As we have previously explained, however, such a holding by the Court would effectively transfer administration of the ordinance from the City to the courts: the appellants have never sought a permit under the ordinances from the City, and it is thus impossible to determine the effect of the ordinances *as applied*. On the other hand, the ordinances on their face without question permit reasonable use of the property. There is no need for a factual trial as to that meaning: the California Supreme Court has provided it.

Under these circumstances, the California Supreme Court quite properly ignored the allegation of the complaint that the ordinance "completely destroyed the value of Plaintiffs' property for any purpose or use whatsoever . . . ." J. A. 7. As the California courts have long recognized:

> "The allegation of a sound conclusion of law is always regarded as superfluous in pleading, and the allegation of an unsound conclusion is entirely disregarded. . . . Why should a general demurrer to a complaint be overruled and the parties required to proceed to the trial of an issue of fact when the court, looking to a law of which it is bound to take notice, can clearly see that

> one of the essential allegations of the complaint can never by any legal possibility be proved? What useful or desirable end could be attained by shutting its eyes to the certain event of the litigation and putting the parties to the trouble, delay, and expense of framing and preparing to try issues which can have no influence upon the final result? These questions answer themselves and make it entirely clear that there are no considerations of expediency or convenience to support the contention of appellant."
>
> *City of Oakland v. Oakland Water Front Co.* (1897) 118 Cal. 234, 245.

There are five additional factors which support the conclusion that there is no "taking" here. First, the appellants have not been singled out for regulation which is not imposed on other similarly situated parcels. The City's zoning ordinances involved "widespread zoning modifications" throughout the City. J. S. A. 3. As we have noted, the ordinances were adopted pursuant to the mandatory statewide requirements of the California Planning and Zoning Law. There is thus no room for the claim that the appellants have been singled out for arbitrary or singular treatment by the City, or that they are being required to carry more than their fair share of public burdens.[12] Cf. *Penn Central Transportation Co. v. City of New York, supra,* 438 U.S. at 131-135. Unless the Court is willing to reject the determination of not only the City of Tiburon but the California Legislature that such ordinances "promot[e] the general welfare" and "protect[] the public interest," the ordinances must be upheld.

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12. The claim of some of the appellants' amici that this case involves "situations of random and isolated confiscation of property interests" and that the burdens imposed on the appellants are purely "randomized" is thus misplaced. Amici Brief (Goldstein *et al.*) 5, 36.

Second, the California Supreme Court has firmly upheld the Legislature's recognition that "it is in the best interests of the state to maintain and preserve open space lands to assure the enjoyment of natural resources and scenic beauty for the economic and social well-being of the state and its citizens." *Associated Home Builders v. City of Walnut Creek, supra,* 4 Cal.3d 633, 638, 648, (". . . the appallingly rapid disappearance of open areas in and around our cities."); *Sweetwater Valley Civic Association v. City of National City* (1976) 18 Cal.3d 270. Thus, "a state tribunal [has] reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted" by the statutory scheme. See *Penn Central, supra,* 125.

Third, the interference with reasonable "distinct investment-backed expectations" (*Penn Central Transportation Co. v. City of New York, supra,* 438 U.S. at 124) is not sufficient to justify a conclusion of a "taking." Indeed, it is impossible to know the extent of such interference, if any, since the complaint does not allege the degree to which the City's current zoning is more restrictive than that which existed when the appellants' purchased their property. It is also impossible to know, since the appellants have never sought permission to build more than the one residence permitted as a matter of right by the City's ordinances.

Moreover, California law has long been clear and unmistakable that " 'landowners have no vested right in existing or anticipated zoning ordinances.' " *HFH Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 516, cert. den. 425 U. S. 904; *Morse v. County of San Luis Obispo* (1967) 247 Cal.App.2d 600, 602-603. The investments of owners of undeveloped property, such as the appellants, thus "were of a sort which society had adequately made known should not become the object of expectations of continuing enjoyment." Michael-

man, "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80 Harv. L. Rev. 1165, 1241. This case therefore differs markedly from *Kaiser Aetna v. United States* (1980) ..... U. S. ..... where the government attempted to convert by regulation an existing private marina "into a public aquatic park . . ."

Fourth, it is important to emphasize again that the open space provisions of the State Planning and Zoning Law do not stand in isolation: each city and county is required to satisfy the other mandatory requirements therein. The mandatory housing element (Government Code § 65302), for example, imposes a requirement upon each local government in California to "make adequate provision for the housing needs of all economic segments of the community."[13] The City of Tiburon is thus compelled, as a matter of state law, to provide through its general plan and zoning ordinances such adequate housing opportunities. *Winkelman v. City of Tiburon* (1973) 32 Cal.App.3d 834. The California Supreme Court has also emphasized that if the impact of local zoning measures "may strongly influence the supply and distribution of housing for an entire metropolitan region, judicial inquiry must consider the welfare of that region." *Associated Home Builders, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 607. California law thus provides for appropriate and balanced development throughout the state, reflecting numerous social needs and values. Accordingly, it cannot properly be said that the

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13. The California Costal Act (Calif. Public Resources Code §§ 30000 et seq.), which provides a mechanism for the permanent protection of California's coastal resources, also specifies that "housing opportunities for persons of low and moderate income shall be protected, encouraged, and, where feasible, provided." Calif. Public Resources Code § 30213.

purpose of either the City's zoning ordinance or the Planning and Zoning Law is exclusionary. Juris. St. 17-18.

Finally, the land use decisions of the California courts reflect an appropriate constitutional analysis: they have consistently emphasized the "reciprocal benefits and burdens" which must underlie valid zoning actions. *HFH Ltd. v. Superior Court, supra,* 15 Cal. 3d 508, 520-521. "A zoning scheme, after all, is similar in some respects to a contract; each party foregoes rights to use its land as it wishes in return for the assurance that the use of neighboring property will be similarly restricted, the rationale being that such mutual restriction can enhance total community welfare." *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal. 3d 506, 517. The various mandatory provisions of the California Planning and Zoning Law provide such reciprocity, since they burden, in some way, each and every property owner within the State of California. There can be no conclusion that this statewide regulatory and planning measure does not apply over a broad cross section of land and thereby "secure[] an average reciprocity of advantage." *Penn Central Transportation Co. v. City of New York, supra,* 438 U. S. 104, 147 (Rehnquist, J., dissenting).

The Court must therefore conclude that the City's ordinances do not on their face constitute a taking of property. The ordinances permit reasonable use of the property; they were enacted as part of a comprehensive state-wide mandate designed to properly plan for the future of California. For these reasons, we do not believe that the Court need reach the question of the proper remedy for police power enactments which result in a "taking" of property. Because the Court may decide that question, however, we address it below.

IV. If a Regulatory Measure Constitutes a Taking of Property Because of Its Effect on a Particular Property Owner, the Appropriate Remedy Is Invalidation of the Measure, Rather Than Judicially Forced Purchase of the Property.

These amici will explain below that if a regulatory measure constitutes a taking of property because of its effect on a particular property owner, the appropriate remedy is invalidation of the measure, rather than judicially forced purchase of the property. The invalidation of the regulatory measure thus leaves the appropriate legislative body with the decision whether the circumstances warrant the exercise of the condemnation power and expenditure of fiscal resources. A contrary result would paralyze regulatory agencies throughout the country.

A. THE COURT'S PRIOR DECISIONS DO NOT SUPPORT THE ASSERTION THAT A MONETARY REMEDY IS COMPELLED FOR A REGULATORY ACTION WHICH CONSTITUTES A TAKING

The theory that a land use regulatory measure might result in a constitutionally compelled award of damages is of recent origin:

> "During the first part of this century, courts had called harsh regulations takings, and, since no compensation had been offered, the courts invalidated them. It hardly occurred to anyone that if the regulation was a taking, then a possible remedy was for the property owner to sue in inverse condemnation . . .
>
> "Until the 1970s, no reported case recognizing inverse condemnation for mere regulation could have been cited." Hagman and Misczynski, *Windfalls for Wipeouts: Land Value Capture and Compensation* (1978) 256, 272.

Indeed, Hagman and Misczynski assert that the concept of compensable regulation was never even raised until 1953. *Id.* at 256.

In fact, several notable property law experts, in a comprehensive historical analysis of the taking clause, concluded that the clause was never intended to apply to regulation of land at all, and that it derived only "from the English nobles' fear of the King's seizures of land for his own use . . . But the use of land was being regulated—often very severely regulated—throughout English and early American history. Only around the turn of the Twentieth Century did judges and legal scholars popularize the notion that if regulation of the use of land became excessive, it could amount to the equivalent of a taking." Bosselman, Callies and Banta, *The Taking Issue* (1973) 319.[14]

Thus, the appellant's claim that "this Court's precedents uniformly support the appropriateness of the monetary 'just compensation' remedy in taking cases" is fiction. They assert that in *Penn Central Transportation Co. v. City of New York, supra,* 438 U. S. 104 and *Lake Country Estates v. Tahoe Regional Planning Agency* (1979) 440 U. S. 391 "the availability of just compensation remedy was not even questioned." App. Brief 34. *Penn Central,* however, hardly assists the appellants: the Court there noted that the appropriate question before it was "whether a particular restriction *will be rendered invalid* by the government's failure to pay for any losses proximately caused by it . . ." 438 U. S. at 124 (emphasis added). *Penn Central* also declares that the appropriate question in a "taking" case is "whether the interference with appellants' property is of such a magnitude

14. "The exact motivation for the adoption of the taking clause may never be ascertained, but at least one thing is clear: the draftsmen were not troubled by any issue involving regulation of the use of land. Such regulations had been standard practice in England and throughout colonial times and seem to have provoked no serious controversy. There is no evidence that the founding fathers ever conceived that the taking clause could establish any sort of restrictions on the power to regulate the use of land." *Id* at 104.

that 'there must be an exercise of eminent domain and compensation to sustain [it]." 438 U. S. at 136. If anything, *Penn Central* thus supports the conclusion that invalidation is the appropriate remedy for a regulatory "taking", unless the regulating government voluntarily chooses to maintain the validity of the regulation by resort to power of eminent domain. *Lake Country,* on the other hand, simply indicates that "there is no reason why relief against TRPA itself should not adequately vindicate petitioners' interests" without discussing the form of relief required. 440 U. S. at 405, n. 29. On remand from *Lake Country,* a federal district court has in fact concluded that invalidation, rather than damages, is the appropriate remedy. *Jacobson v. Tahoe Regional Planning Agency* (D. Nev. 1979) 474 F.Supp. 901.

The additional claim that *Hurley v. Kincaid* (1932) 285 U. S. 95 "is well nigh dispositive" (App. Brief 35) is even further afield. *Hurley* not only involved physical invasion of land—there a flooding easement—but also involved an affirmative governmental decision to proceed with a public works project which would physically affect private property, without first filing condemnation proceedings. *Hurley,* and the other similar cases cited by the appellants (App. Brief 35, n. 16) simply reflect a corollary to the rule that the United States may constitutionally enter into physical possession of property without first filing condemnation proceedings, and instead may take the property and require the owner to himself institute proceedings under the Tucker Act. *United States v. Dow* (1958) 357 U. S. 17, 21. Where such a conscious governmental choice is made, an injunction against the project would thwart the Government's admittedly constitutional power of condemnation; under such circumstances, limiting the remedy to an award of damages is of course proper, and is the only remedy consistent with the affirmative governmental decision to condemn.

In *Regional Rail Reorganization Act Cases* (1975) 419 U. S. 102, the Court utilized the same analysis. There, the Court concluded that Congress intended for its reorganization measure to become effective, and also intended to provide a Tucker Act remedy, in the event that its action violated the Fifth Amendment. An injunction in that case, rather than the damage remedy, would have dismantled the comprehensive reorganization scheme assembled by Congress. An award of damages thus simply effectuated Congressional purpose, consistent with Congressional awareness that its actions might require compensation to remain valid. As the Court noted:

> "There are clearly grave doubts whether the Rail Act would be constitutional if a Tucker Act remedy were not available as compensation for any unconstitutional erosion not compensated under the Act itself .... [O]ur 'task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations.'" 419 U. S. at 134.

Thus, these cases have sanctioned the use of a damage remedy only where Congress first determined that resort to the public purse was appropriate: that decision was not made by the Court as a constitutional command.

B. A MONETARY REMEDY FOR A REGULATORY ACTION WHICH CONSTITUTES A TAKING IS INAPPROPRIATE UNLESS THE REGULATING AGENCY HAS AFFIRMATIVELY DETERMINED TO EXERCISE ITS POWER OF EMINENT DOMAIN. A CONTRARY CONCLUSION WOULD TRANSFER THE POWER OF EMINENT DOMAIN FROM LEGISLATURES TO THE JUDICIARY

The position of the amici was succinctly stated by the New York Court of Appeals in *Fred F. French Investing Co. v. City of New York* (1976) 385 N.Y.S. 2d 5, appeal dism'd. 429 U.S. 990:

> "The power of the State over private property extends from the regulation of its use under the police power to the actual taking of an easement or all or part of the fee under the eminent domain power. . . .
>
> "[W]hen the State 'takes', that is appropriates, private property for public use, just compensation must be paid. In contrast, when there is only regulation of the uses of private property, no compensation need be paid. Of course, and this is often the beginning of confusion, a purported 'regulation' may impose so onerous a burden on the property regulated that it has, in effect, deprived the owner of the reasonable income productive or other private use of his property and thus has destroyed its economic value. In all but exceptional cases, nevertheless, such a regulation does not constitute a 'taking', and is therefore not compensable, but amounts to a deprivation or frustration of property rights without due process of law and is therefore invalid.
>
> "True, many cases have equated an invalid exercise of the regulating zoning power, perhaps only metaphorically, with a 'taking' or a 'confiscation' of property, terminology appropriate to the eminent domain power and the concomitant right to compensation where it is exercised. . . .
>
> "The metaphor should not be confused with the reality. Close examination of the cases reveals that in none of them, anymore than in the *Pennsylvania Coal* case . . . was there an actual 'taking' under the eminent domain power, despite the use of the terms 'taking' or 'confiscatory'. Instead, in each the gravamen of the constitutional challenge to the regulatory measure was that it was an invalid exercise of the police power under the due process clause, and the cases were decided under that rubric .... As has been cogently pointed out by Professor Costonis: 'the goal of [challenges to regulatory measures] in conventional land use disputes is to preclude application of

> the measure to the restricted parcel on the basis of constitutional infirmity. What is achieved, in short, is declaratory relief. The sole exception to this mild outcome occurs where the challenged measure is either intended to eventuate in actual public ownership of the land or has already caused government to encroach on the land with trespassory consequences that are largely irreversible.' " 385 N.Y.S.2d at 8-9.

Thus, as the New York Court noted, the power to regulate and the power of eminent domain are two discrete powers of government: the fact that the former may be limited by the same constitutional clause which limits the latter does not mean that the latter has *a fortiori* been exercised when that limit is reached. Where the legislature has not chosen to exercise its eminent domain power, the Courts should not compel its use as a damage remedy. Such a result simply recognizes the proper institutional role of the legislative branch of government in determining when that legislative power should be exercised.[15]

That institutional understanding underlies many recent federal decisions in this area of the law. In the *Regional Rail Reorganization Act Cases, supra,* 419 U. S. 102, for example, the District Court had declared section 304(f) of the Reorganization Act void, as constituting a taking

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15. Prior to *Agins,* the California Supreme Court had expressed the same view. In *HFH Ltd. v. Superior Court, supra,* 15 Cal.3d 508, cert. den. 425 U. S. 904, the Court stated:

> "Courts have thus recognized that '[o]f course, it is not a tort for Government to govern . . . . *(Dalehite v. United States* (1952) 346 U. S. 15, 57, (Jackson, J., dissenting); *Muskopf v. Corning Hospital Dist.* (1961) 55 C.2d 211, 220.) Justice Jackson's mot expresses both a principle of law and a necessity of rational government; both constitutional and institutional understandings require that legislative acts, even if improper, find their judicial remedy in the undoing of the wrongful legislation, not in money damages awarded against the state." 15 Cal.3d at 519.

of property. The District Court refused to award damages for that taking, on the ground that damages would be " 'judicial legislation on a grand, if not arrogant scale.' " 419 U. S. at 126. This Court concluded that Congress intended to provide for a damage remedy in the event that the Act constituted a taking, and therefore reversed the judgment. The Court emphasized, however, that such remedies could not be provided by the Court, and that the appropriate question was whether *Congress* had intended to provide them. As the Court declared:

> " 'The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the Government . . . .' " 419 U. S. at 127 n. 16.

In *Pauley Petroleum Inc. v. United States* (Ct. Cl. 1979) 591 F.2d 1308, 1326-1327, cert. den. ..... U.S. ....., the Court likewise rejected a claim that an action by the Secretary of the Interior suspending oil drilling leases constituted a "taking" of the leasehold interests which had originally been granted by the United States:

> "Plaintiffs fail to meet at least one of the prerequisites for a constitutional taking—the requirement that the taking be authorized by Congress. In order to establish a constitutional taking, plaintiffs must show that the officer committing the alleged taking has either express or implied legislative authority to take the property . . . .
>
> " 'But Congress no more impliedly authorized the Secretary to take the leasehold by prohibiting its beneficial use than by a condemnation proceeding. A suspension for which the fifth amendment would require compensation is therefore unauthorized and beyond the Secretary's power . . . .' It follows . . . that there

was no constitutional exercise of the eminent domain power."[16]

Accord: Union Oil Co. v. Morton (9th Cir. 1975) 512 F.2d 743; *Gregory v. City of New York* (S.D.N.Y. 1972) 346 F.Supp. 140, 143; *Golding v. New Britain* (Pa. 1978) 382 A.2d 509. In *NBH Land Co. v. United States, supra,* the Court likewise declared:

> "Cases of 'inverse' takings without physical invasion or ousters are not very numerous, and when they occur . . . this court has been careful to consider the role of Congress, and the taking, if not expressly authorized or directed by Congress, at least is a natural consequence of Congressionally approved measures . . . . To reach the result of those cases here, in a case when the only participation by Congress has been to reject the acquisition out of hand, would strike a blow at the power of the purse. The exclusive assignment of that power to Congress is the foundation of our liberties." 576 F.2d at 319.

The federal courts have thus rejected the appellants' contention that the question whether a public agency has affirmatively chosen to exercise its eminent domain power

16. *Drake's Bay Land Co. v. United States* (Ct. Cl. 1972) 424 F.2d 574, often cited by the appellants, is consistent with this view. In *NBH Land Co. v. United States* (Ct. Cl. 1978) 576 F.2d 317, the Court explained:

> "It was an express assumption in *Drake's Bay* that Congress hoped its measure would not transgress the line drawn by the fifth amendment, but was presumably aware, if they did, they would generate money claims under the Tucker Act . . . . [A] Tucker Act suit does not lie for an executive taking not authorized by Congress, expressly or by implication." 576 F.2d at 319.

Drake's Bay involved legislation under which Congress announced the acquisition of "an inchoate interest at once, to be perfected later." 424 F.2d at 584. An inverse judgment was thus fully consistent with Congressional intent to formally acquire the property.

is irrelevant in determining the remedy for a regulatory "taking" of property. App. Brief 15-21. Instead, the courts have emphasized that the legislative branch is the appropriate branch of government for a determination whether that power will be exercised, and public funds expended.[17] The appellants themselves concede the correctness of this view: as they note, "the exercise of the taking power" "is a political question" and its exercise "has been entrusted to the legislature . . . ." App. Brief, 16-17. In this case, of course, the City of Tiburon once sought to purchase the appellants' property, but abandoned the attempt because of the expected high cost of the property; the City Council has thus affirmatively declined to further exercise its power of eminent domain. As we previously noted, moreover, the California Legislature has declared that the provisions of the Planning and Zoning Law cannot be construed as permitting a local government, through open space zoning, to take private property for public use without just compensation. Calif. Government Code § 65912.

17. California law provides detailed limitations and procedures for exercise of the eminent domain power. "The power of eminent domain may be exercised to acquire property for a particular use only by a person authorized by statute . . ." and "[a] public entity may not commence an eminent domain proceeding until its governing body has adopted a resolution of necessity that meets the requirements of [California law]." Calif. Code of Civil Procedure §§ 1240.202 and 1245.220. Such a resolution of necessity requires specific factual determinations by the governing body of the public entity. Calif. Code of Civil Procedure § 1245.230. See generally Calif. Code of Civil Procedure §§ 1230.010 et seq. Under California law, a municipality does not have the power of eminent domain unless authorized by statute and it must adhere to the procedures established by statute. *City of Beaumont v. Beaumont Irrigation District* (1965) 63 Cal.2d 291; *City and County of San Francisco v. Ross* (1955) 44 Cal.2d 52. State agencies likewise do not have the power of eminent domain, unless specifically authorized by statute. *People v. Superior Court* (1937) 10 Cal.2d 288. None of these California amici has been given that power.

The California Supreme Court decision in this case reflects the proper judicial respect for those determinations. As the Court declared:

> "Plaintiffs contend that the limitations on the use of their land imposed by the ordinance constitute an unconstitutional 'taking of [plaintiffs'] property without payment of just compensation' for which an action in inverse condemnation will lie. Inherent in the contention is the argument that a local entity's exercise of its police power which, in a given case, may exceed constitutional limits is equivalent to the lawful taking of property by eminent domain thereby necessitating the payment of compensation. We are unable to accept this argument believing the preferable view to be that, while such a governmental action is invalid because of its excess, remedy by way of damages in eminent domain is not thereby made available. . . ." J. S. A. 5

A contrary result would significantly reduce, if not emasculate, legislative control over the proper allocation of often limited financial resources. For example, we are advised by the City that the $2,000,000 damage claim for the appellants' five-acre parcel is alone far more than the City's annual budget: the appellants' complaint was filed in 1975, and the City's *total* budget for that year was only $824,000. A judgment in the amount sought would thus destroy the City's ability to provide other necessary public services. Cf. *National League of Cities v. Usery* (1976) 426 U. S. 833, 852.

Two other examples demonstrate the same point. In *Virginia Surface Mining and Reclamation Association v. Andrus* (W. D. Va. 1980) ..... F. Supp. ....., a District Court held that certain provisions of the federal Surface Mining Control and Reclamation Act so burdened the owners of potential coal producing land as to constitute a taking of property in violation of the Fifth Amendment. That federal

Act applies to a large percentage of the land in the Commonwealth of Virginia, not to mention other states. If the appellants' contentions here are accepted, and if the District Court's conclusion in *Virginia Surface Mining* is correct, the conclusion must logically be reached that the United States has inadvertently purchased an enormous portion of the Commonwealth of Virginia.

In *Sotomura v. County of Hawaii* (D. Haw. 1978) 460 F.Supp. 473, a District Court held that a decision of the Hawaii Supreme Court in effect "took" the plaintiffs beachfront property. Since the Hawaii Supreme Court decision purported to establish a property rule throughout the State of Hawaii, under the appellants' theory here Hawaii is now likewise inadvertently obligated to pay the fair market value of all such property. The appellants draw no distinction between agencies which have the power to condemn, and those which do not.

The California Court's decision, on the other hand, leaves the question of the exercise of the eminent domain power to the Legislature, where it institutionally should rest. " 'If a zoning ordinance is enjoined, the legislative body, rather than the court, can then decide whether the social benefits flowing from the plan warrant the exercise of eminent domain and the expenditure of public resources. When the legislature decides that the costs outweigh the benefits, it can either abandon the objective entirely, enact less stringent regulation or combine regulation with compensation.' " *Jacobson v. Tahoe Regional Planning Agency, supra,* 474 F.Supp. 901, 904.[18]

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18. Some States have explicitly provided for such a determination in the regulatory measure itself. The Delaware Wetlands Statute (7 Delaware Code, Chapter 66), for example, provides that "if the Superior Court finds that the action appealed from constitutes a taking without just compensation, it shall invalidate the

In summary, as the California decision explained, "'[i]n enacting a zoning ordinance, the legislative body assesses the desirability of a program on the assumption that compensation will not be required to achieve the objectives of that ordinance.'" J.S.A. 11. If that assumption is incorrect, however, and if "the interference with appellants' property is of such a magnitude that 'there must be an exercise of eminent domain and compensation to sustain [it]'" (*Penn Central, supra,* 136), the weighing of costs and benefits in the decision whether that power should be exercised should be left to the legislature rather than the courts.

C. MONETARY DAMAGES FOR A LAND USE REGULATION WHICH CONSTITUTES A TAKING WOULD PARALYZE LAND USE REGULATION

The extraordinary breadth of the appellants' contention must be recognized. This Court has consistently held that the diminution in value caused by a regulatory measure does not result in a taking of property, and compensation is not required to sustain its validity. *Penn Central Transportation Co. v. City of New York, supra,* 438 U. S. at 131. The appellants, however, argue that a regulatory measure which renders property valueless *is* a taking, and that compensation for the full fee value of the property must thereupon be paid. Thus, even though the plaintiff in *Euclid Realty* must bear a 75% loss in property value without any compensation, and even though the plaintiff in *Hadacheck* must bear an 87½% diminution without any compensation (*Penn Central* at 131), the appellants here argue that they

order and grant appropriate relief . . . ." The effect of such an order is, however, statutorily stayed for a period during which the Secretary of Natural Resources and Environmental Control may determine whether to invalidate his action or to initiate condemnation proceedings to acquire the fee or any lesser interest. A similar provision is provided in the Delaware Coastal Zone Act (7 Delaware Code, Chapter 70). Other states have similar provisions. E.g., Mass. Gen. Laws C. 131, § 40A, and C. 130, § 105.

are entitled to *complete* compensation for the full fee value of their property. In addition, the appellants do not suggest any form of immunity which would be applicable to this case. They contend that "when a taking occurs, the question is whether just compensation has been paid . . . [T]he subjective 'intention' of the taking entity is of no moment . . ." App. Brief 17-18.[19] Slightly cross the line, so say the appellants, and the hammer falls.

Under these circumstances, it is no hyperbole to state that the Court's acceptance of the appellants' contentions would paralyze local land use regulatory bodies. Especially given the limited budgets of most cities, only the bravest legislator or regulator will venture more than the mildest, and most ineffectual, form of land use controls.

The California Supreme Court's decision properly emphasizes this effect as a ground for rejecting damages as a possible remedy:

> "The expanding developments of our cities and suburban areas coupled with a growing awareness of the necessity to preserve our natural resources, including the land around us, has resulted in changing attitudes toward the regulation of land use. Recognition of this historic trend is not new. The United States Supreme Court perceptively observed more than 50 years ago that with the passage of time and increased concentration of people 'problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use

19. The appellants, with scant regard for consistency, nonetheless attack the well-settled rule that the motives of legislators and administrative decision makers may not be probed. App. Brief 52 and n. 31. E. g., *United States v. Morgan* (1941) 313 U. S. 409, 422; *Fletcher v. Peck* (1810) 6 Cranch 87, 130-131; *United States v. O'Brien* (1968) 391 U. S. 367, 383; *State of California v. Superior Court* (1974) 12 Cal.3d 237; Bickel, *The Least Dangerous Branch* (1962) 215.

and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, . . . And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.' (*Euclid v. Ambler Realty Co.* (1926) 272 U. S. 365, 386-387.)

"In the half century since *Euclid* the foregoing abstract principles under the force of experience have coalesced into a specific functional requirement. Community planners must be permitted the flexibility which their work requires. As we ourselves have recently observed, 'If a governmental entity and its responsible officials were held subject to a claim for inverse condemnation merely because a parcel of land was designated for potential public use on one of these several authorized plans, the process of community planning would either grind to a halt, or deteriorate to publication of vacuous generalizations regarding the future use of land.' (*Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 120.)

"Other commentators have recognized that the utilization of an inverse condemnation remedy would have a chilling effect upon the exercise of police regulatory powers at a local level because the expenditure of public funds would be, to some extent, within the power of the judiciary. 'This threat of unanticipated financial liability will intimidate legislative bodies and will discourage the implementation of strict or innovative planning measures in favor of measures which are less

stringent, more traditional, and fiscally safe.' (Hall, *Eldridge v. City of Palo Alto: Aberration or New Direction in Land Use Law?* (1977) 28 Hastings L. J., 1569, 1597)." J. S. A. 9-11.

The New York Court of Appeals has expressed the same view:

> "[T]he prospect of tort liability might impede . . . desirable governmental regulation and legislation since [governmental] officers might fear subsequent judicial imposition of massive tort recoveries. Open-ended liability could inhibit the enactment of needed, but constitutionally borderline, legislation. The most salutary and effective means to curtail unconstitutional action is to stop the action before it can take effect. Indeed, the prospect of a tort action might incite potential plaintiffs to cumulate their damage and institute their constitutional claims only after significant passage of time and significant reliance upon the heretofore unchallenged validity of its action by the governmental unit involved. In the absence of legislative guidance and compelling precedent, we decline to extend tort liability for unconstitutional action to situations where government has not trespassed in some manner upon the burdened property." *Charles v. Diamond* (1977) 392 N.Y.S.2d 594, 604-605.

The paralyzing effect of such a result would also be felt by these amici, since each administers not local land use ordinances, but regional or statewide regulatory measures designed to control or prevent land uses harmful to the environment or to the natural resources of the state. Other states have enacted similar statutes designed specifically to prevent damage to wetlands. These measures often involve innovative statutory procedures and standards to achieve their stated ends, and those procedures and standards normally have not been tested by the courts for their constitu-

tional validity, prior to the enactment of the measure. E.g., *CEEED v. California Coastal Zone Conservation Commission, supra,* 43 Cal.App.3d 306; *Candlestick Properties v. San Francisco Bay Conservation and Development Commission, supra,* 11 Cal.App.3d 557. The *CEEED* case, for example, began as a class action seeking damages for each property owner on California's 1100-mile coastline, on the ground that each such property had been "taken" by the passage of the California Coastal Zone Conservation Act of 1972. To conclude that even inadvertent constitutional violations flowing from such regulation require monetary compensation would necessarily end such innovative and necessary regulation by the states.

This Court has consistently emphasized, however, that a damage remedy should not be available where it would have such an effect:

> "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subject to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Tenney v. Brandhove* (1951) 341 U. S. 367, 377.

Accord: Lake Country Estates v. Tahoe Regional Planning Agency, supra, 440 U. S. 391.

Tenney and *Lake Country,* of course, dealt with damage actions against the individual legislators of a state legislature and a regional body. There is no reason, however, not to apply the same rationale to local legislators and the local legislative body which they represent and which they

collectively form. Indeed, municipal legislators and local legislative bodies are closer to their constitutents than either their state or federal counterparts; the impact of their regulatory actions is more easily apparent. They thus are the most vulnerable to and least able to defend lawsuits caused by the passage of legislation. The gross variance between the damages sought by the appellants here and the City of Tiburon's operating budget alone demonstrates the inhibiting effect which the prospect of damages against such public officials and agencies can have. If that effect is multiplied by potential damage claims for the remainder of the land within the City, land use regulation, not to mention innovative regulatory measures, cannot conceivably withstand the financial threat.

These amici also believe it important to emphasize the costs of litigating an action in which damages is a possible remedy, as opposed to an action in which invalidation is the result. In either case, the first item of proof for the property owner is evidence that the property has been "taken." Whether the action is for damages or invalidation, this proof would remain the same. In an action for damages, however, rather than a judicial decree of invalidation after such a showing, the parties must proceed to try the issue of the fair market value of the property, with all the attendant complexities and technicalities of an eminent domain proceeding. In states such as California, the cost of the litigation, if the landowner is successful, is taxable to the regulatory body. Calif. Code of Civil Procedure § 1036. This amount includes his "reasonable attorney, appraisal, and engineering fees, actually incurred . . ." *Id.* The property owner is also entitled to interest from the date of taking. As a result, the cost to the public agency from a successful inverse condemnation damage action is far more

than simply the fair market value. Moreover, even if the public agency is successful in prevailing in the appellate courts, it cannot recover its complete defense costs.

One recent case is instructive on this point. In *Briggs v. State of California* (1979) 98 Cal.App.3d 190, the California Court of Appeal reversed an inverse condemnation judgment against the State of California. The record in that case, which we expect to be before this Court on petition for certiorari in the near future, discloses that the State's defense expenditures were more than $235,000; the trial court also concluded that the landowner's costs were more than $200,000, and her reasonable attorneys' fees were $751,000.[20] The simple *potential* for incurring all or part of such costs, even in a successful action, is thus an additional inhibiting factor to any regulatory agency.

The costs and judgments in damage actions arising from land use regulatory measures will, if the appellants' contentions are accepted, paralyze land use regulation throughout the United States.[21] For that reason alone, the California Supreme Court's decision must be affirmed.

20. We cannot help but comment on the appellants' distorted recitation of the facts in *Briggs*. The recitation cannot be attributed to a lack of familiarity with the record, since the appellants' lead counsel here (as well as two of their amici) have represented Briggs. The trial court there found that a permit application by Briggs to the Coastal Commission was denied for the reasons stated by the Coastal Commission, which included not only a possibility of purchase but inconsistency with the substantive standards of the California Coastal Act. Moreover, the permit was not denied permanently, but only for the limited and interim planning and regulatory period of the 1972 Coastal Act. The trial court awarded $469,300 in damages to Briggs based *solely* on the permit denial. The Court of Appeal held that the permit denial was a constitutionally permissible exercise of the Commission's temporary powers. In the alternative, it held that the denial should have been remedied by mandate under *Agins* rather than by an award of damages. It is thus nonsense to suggest that the California Court of Appeal required Briggs to seek invalidation even before her purported cause of action accrued. App. Brief 50.

V. Invalidation of a Regulatory Measure Which Constitutes a Taking of Property Is an Effective and Appropriate Remedy.

A large portion of the appellants' brief is directed to the *ipse dixit* that the California courts fail to provide the protection required by the federal constitution to private property rights. That assertion is incorrect.

In the opinion below, the Court stated:

> "While acknowledging the power of government to preserve and improve the quality of life for its citizens through the regulation of the use of private land, we cannot countenance the service of this legitimate need through the uncompensated destruction of private property rights. Such Fifth Amendment property rights have been equated by the constitutional draftsmen with the cherished personal protections against self-incrimination, double jeopardy, and the guarantee of due process of law." J. S. A. 7.

Moreover, within one year of the *Agins* decision, the same Court twice concluded that monetary damages could be an appropriate remedy for unconstitutional governmental interference with property rights. *Furey v. City of Sacramento* (1979) 24 Cal.3d 862, 873, app. dism'd. ..... U. S. ..... (rezoning precluding realization of substantially all special

21. One additional factor bears on this point. A judicial determination that a regulatory action has deprived property of all value can be made only after a trial on the merits; such a trial invariably involves completely disparate valuation testimony from appraisers for the parties, with the trial court deciding the case simply by a preponderance of the evidence. In short, the case will inevitably be decided by the perception of the trial judge, and his individualized analysis of the conflicting evidence. It would be impossible for a regulatory agency to draw a hard and well-defined line as to the permissible extent of its powers, in light of that variable reality.

benefits generated by assessment district); *Jones v. People ex rel. Department of Transportation* (1978) 22 Cal.3d 144 (access denied to private property by regulatory action, in conjunction with construction of public project); see also *Klopping v. City of Whittier* (1972) 8 Cal.3d 39. The appellants' contention that the California courts will ignore the protections afforded by the federal constitution to private property owners is thus completely unwarranted.[22]

The appellants' further suggestion that public agencies will simply change an invalidated regulatory measure in an effort to frustrate both the judicial decree of invalidation and the landowner's private property rights is likewise without merit. "[T]his problem" (App. Brief 47) is—like many of appellants assertions—without citation of case authority. Public officials, after all, are also sworn to uphold constitutional rights to the best of their ability, and they therefore are not likely to knowingly and voluntarily violate that oath. The lack of any citations by appellants to support their claim is the best evidence of the non-existence of "this problem." Amicus California Coastal Commission, for example, has been told by the California courts that its regulatory decisions in some cases were improper. With only one exception, the matters were expeditiously resolved in further administrative proceedings; in the one exception, the Commissions reached the same result as they

22. The appellants' recitation of cases (App. Brief 45-47) purportedly demonstrating their point is incomplete; they fail to note that in many of them, this Court later dismissed an appeal or denied certiorari. E.g., *McCarthy v. Manhattan Beach* (1953) 41 Cal.2d 879, cert. den. 348 U. S. 817; *Consolidated Rock Products Co. v. City of Los Angeles* (1962) 57 Cal.2d 515, appeal dismissed for lack of a substantial federal question 371 U. S. 36; *Avco Community Developers v. South Coast Regional Commission* (1976) 17 Cal.3d 785, appeal dismissed for lack of jurisdiction and cert. den. 429 U. S. 1083; *Frisco Land and Mining Co. v. State of California* (1977) 74 Cal.App.3d 736, cert. den. 436 U. S. 918.

had in the first instance, and their decision was ultimately sustained on return to the courts.[23] Thus, this Court should not uphold the massive financial dislocation and regulatory paralysis which the appellants seek here, simply to protect against the improper governmental actions which they unjustifiably speculate and hypothesize may occur.

Public officials, in addition, do not lightly risk contempt of court sanctions for subverting judicial decrees. The courts, both state and federal, have sufficient enforcement powers to ensure that their decrees are observed, including the ultimate power to mandate specific actions, if good faith responses are not forthcoming. There are thus numerous means, other than the drastic remedy sought here, to provide relief for improper governmental responses after a decree invalidating a regulatory measure.

CONCLUSION

For each of these reasons, these amici therefore respectfully urge that the judgment of the California Supreme Court be affirmed.

March 20, 1980

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23. The appellants assert—again without citation of authority—that the Coastal Commissions "literally pride themselves on their capricious and callous treatment of property owners . . ." App. Brief 47. If that were so, the state and federal courts would long ago have brought the Commissions up short. A review of the litigation in which the Commissions have been involved, however, virtually all sustaining the Commissions' actions, firmly emphasizes that the contention is only epithetical excess.

FOR ARGUMENT

Supreme Court, U.S.
FILED
MAR 24 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,
Appellants,

vs.

CITY OF TIBURON,
Appellee.

Amicus Curiae Brief of the States of Colorado, Delaware, Florida, Hawaii, Illinois, Louisiana, Maine, Maryland, Massachusetts, New York, Ohio, Oregon, Vermont, Washington and Wisconsin.

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In the Supreme Court of the United States

October Term, 1979

No. 79-602

Donald W. Agins and Bonnie G. Agins,
Appellants,

vs.

City of Tiburon,
Appellee.

Amicus Curiae Brief of the States of Colorado, Delaware, Florida, Hawaii, Illinois, Louisiana, Maine, Maryland, Massachusetts, New York, Ohio, Oregon, Vermont, Washington and Wisconsin.

Appeal from the Supreme Court of California

INTRODUCTION

Pursuant to Rule 42(4) of this Honorable Court, the States of Colorado, Delaware, Florida, Hawaii, Illinois, Louisiana, Maine, Maryland, Massachusetts, New York,

Ohio, Oregon, Vermont, Washington and Wisconsin hereby submit this amicus curiae brief in support of the City of Tiburon.

INTEREST OF THE AMICI STATES

The ordinances of the City of Tiburon permit the construction of up to five residences on the appellants' five acre parcel of property; the ordinances specify that the appellants may construct one residence as a matter of right. The California Supreme Court opinion, *Agins v. City of Tiburon,* 24 Cal. 3d 266 (1979), holds that these ordinances, on their face, do not constitute a taking of property. The Court further indicated, moreover, that the appropriate remedy for an ordinance which "takes" property is invalidation of the ordinance, rather than an award of damages.

The cities and counties of each of these amici administer various zoning and land use measures. Some of the cities and counties of these amici have adopted ordinances designed to control their rates of growth and to ensure the adequate provision of municipal services. See, e.g., Einsweiler, Gleeson, Ball et al., Comparative Descriptions of Selected Municipal Growth Guidance Systems. A Preliminary Report, in 2 Management and Control of Growth 283 (R. Scott ed. 1975). In response to the federal Coastal Zone Management Act of 1972 (16 U.S.C. §§ 1451 et seq.), many of these amici, like California, have enacted comprehensive coastal zone management laws. See, e.g., Wash. Rev. Code Ann. §§ 90.58.010 et seq. Some of the amici have also enacted legislation designed to protect the resources of the wetlands of their states. See, e. g., *Just v. Marinette County,* 201 N. W. 2d 701 (Wis. 1972); *Department of Natural Resources v. Lynchester Sand and Gravel Corp.,* 334 A. 2d 514 (Md. 1975); *Hayes v. Yount,* 552 P. 2d 1038 (Wash. 1976); *Lovequist v. Conservation Commission,* 393 N. E. 2d 858 (Mass. 1979).

All of these measures may adversely affect the value of privately held property. For that reason, the decision of this Court will extend far beyond the immediate impact on the City of Tiburon's zoning ordinances. Indeed, each of these amici emphatically join with California in asserting that adoption of the appellants' position would paralyze each and every one of these regulatory measures, and would inhibit the adoption of any significant regulatory measures in the future.

CONCLUSION

Each of these amici has reviewed the amicus curiae brief submitted by the State of California. Each respectfully joins in California's contention that invalidation, rather than monetary damages, is the appropriate remedy for a constitutionally impermissible regulatory action, and therefore urges that the judgment of the California Supreme Court be affirmed.

March, 1980.

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Supreme Court, U.S.
FILED
MAR 24 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979
No. 79-602

DONALD W. AGINS AND BONNIE G. AGINS,
Appellants,

vs.

CITY OF TIBURON,
Appellee.

On Appeal From the Supreme Court of California.

BRIEF OF AMICI CURIAE FEDERATION OF HILLSIDE AND CANYON ASSOCIATIONS, INC. AND BRENTWOOD COMMUNITY FEDERATION IN SUPPORT OF APPELLEE, CITY OF TIBURON.

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AMICI CURIAE.

Amici curiae are two federations of homeowners' organizations which represent residents in the Santa Monica Mountains of Los Angeles. The Federation of Hillside and Canyon Associations, Inc. includes the following: Bel-Air Association, Benedict Canyon Association, Briarcliff Homeowners' Association, Cahuenga Pass Property Owners' Association, Canyon Drive Homeowners' Association, Casiano Homeowners' Association, Curson Canyon Homeowners' Association, Encino Property Owners' Association, Hollywood-Crescent Homeowners' Association, Hollywood-Dell Homeowners' Association, Hollywood Knolls Homeowners' Association, Hollywoodland Improvement Association, Hollywood Manor Homeowners' Association, Lake Hollywood Homeowners' Association, Laurel Canyon Association, Laurel Hills Homeowners' Association, Lookout Mountain Associates, Maybrook Homeowners' Association, Mount Olympus Homeowners' Association, Mount Washington Homeowners' Association, Mountain Area Protective Society, Mulholland Property Owners' Association, Nichols Canyon Property Owners' Association, Outpost Homeowners' Association, Residents of Beverly Glen, Roscomare Valley Association, Sherman Oaks Property Owners' Association, Studio City Homeowners' Association, Tarzana Property Owners' Association, Whitley Heights Homeowners' Association, and Woodland Hills Residents' Association. The Brentwood Community Federation includes: Brentwood Hills Association, Brentwood Homeowners' Association, Brentwood Terrace Homeowners' Association, Crestwood Hills Association, Mandeville Canyon Association, South Brentwood Association, Sullivan Canyon Association, and Upper Mandeville Canyon Association. In addition, two homeowners' associations, Bel-Air Knolls and Bel-Air Skycrest Associations, are members

of both federations, because their geographical representation overlaps jurisdictional lines.

Counsel for both parties have granted consent to submission of this brief pursuant to Supreme Court Rule 42. The original letters of consent have been lodged with the Clerk of this Court.

I
INTRODUCTION.

Amici are two federations of homeowners' associations that span the Santa Monica Mountains in the City of Los Angeles. They are filing this brief because they believe that their concerns have not yet been presented to this court.

They represent the members of the public—citizens, homeowners, residents and taxpayers—who are directly impacted by the land use controls imposed by government. They contend that the appropriate use of land is a matter of essential public concern and that the determination of land use is a public process, which process will be essentially compromised by acceptance of Appellants' contention that development rights are compensable when the government regulates land.

Amici wish to bring to the attention of the Court their contentions that determination of reasonable restrictions on land use depends on the nature of the land to be developed and the carrying capacity of the land. They suggest that a legislative body may reasonably conclude that, under given circumstances, it would be more detrimental than beneficial to permit development of marginal land.

They do not accept the basic premise of Appellants that profit in the sale of land is of a Constitutionally protected dimension. Rather, *amici* assert that the right to develop land must be balanced by the right not to be injured.

The government is the scale that weighs the potential benefit of development against its potential for harm. It is to present a counter-balance to the interests of the merchants of land that citizen *amici* have sought leave to file this brief.

Specifically, *amici* will argue:

- The use and development of land is a public issue. Public input is essential to determination of appropriate land use. This input is lost by Appellants' strategy of direct appeal to the Courts.
- Failure to exhaust administrative remedies prior to initiation of an inverse condemnation action deprives citizens of their vital right to be involved and heard in land use decisions which directly affect them.
- With undeveloped land, failure to secure a governmental determination of reasonable density before initiating an inverse condemnation action deprives the judiciary of the necessary facts concerning the character of the land, the reasonableness of the regulation, and the realistic market value of the land.
- Development rights are not compensable under the just compensation clause.
- The speculative fair market value of undeveloped land provides an inflated measure of damages in an inverse condemnation action.

II
INTEREST OF AMICI.

Amici associations are made up of citizens who live in the urbanized hillside, canyon and mountaintop communities of the Santa Monica Mountains in Los Angeles. Their interest in the consequences of expedient, massive, unthinking and unsound development in fragile geographic areas is both direct and personal. Development of hillsides unsuitable for homes may pose a danger to life and property to adjacent communities.

The Court is asked to take judicial notice of the fact that twice within the past two years (February/March, 1978 and February, 1980), the hillsides and canyons of Los Angeles have been devastated when heavy rains brought flooding, landslides and mudslides resulting in massive damage to hillside homes and injury and death to their occupants. The

damages were, in part, a result of land use decisions made in years past. The catastrophic effect of those earlier decisions is irreversible; future land use decisions, made without full disclosure of the inherent limitations of the land and without full consideration of the potential impact on the surrounding community, will likewise be irreversible.

Amici have a two-fold experience in the local land use planning and decision-making process.

They have played a vital role as community advocates when individual development plans have been considered by local government, reminding cities and counties of the specific needs of their communities and have publicly debated the wisdom of allowing maximum development density in areas where the resulting hazards to life and property might be considerable. Their right to review and be heard on land use applications is both recognized and required by the California planning and zoning codes and the Los Angeles Municipal Code. *California Government Code §66451, §66452.5* and *Los Angeles Municipal Code §17.00 et seq.*

Amici have also served as citizen lobbyists to secure needed land use regulations. The regulations they have proposed were often resisted initially by local government where such regulations have had the effect of restricting maximum density of development.

They were, for example, influential in promoting the revision of the Los Angeles grading ordinances, which both the City and the developers now look to with pride. Their members have actively worked on the Citizens' Advisory Committees that provided the necessary input in the creation of the hillside Community Plans that form an integral part of the Los Angeles General Plan. Many of their members have served on these Citizens' Advisory Committees and have successfully included a slope/density ordinance in their

Community Plans that limits density in the hillsides in direct ratio to the steepness of the natural slope.

The slope/density formula is particularly applicable to considerations of the issue in the present action, because it is representative of planning that severely restricts density (and, arguably, the marketability of land) and is, at the same time, a reasonable exercise of the police power.

The rationale underlying slope/density is that there is a reasonable relation between the steepness of the natural slopes in the hillsides and the carrying capacity of the land. That is, for example, the steeper the slopes, the more inaccessible the terrain, the greater the difficulty in providing fire protection in narrow, winding mountain streets. And, as another example, the more inaccessible the streets, the greater the cost of providing police protection. And, the steeper the slope, the greater the threat of flooding and mudslides.

These are among the considerations that led to density limitations that restrict density to as little as one dwelling unit to twenty acres in the steepest parts of the mountains (where the slopes are greater than thirty-five per cent).

The formula is presently being tested in an inverse condemnation action by the owner of an estate in Benedict Canyon in *Kollsman v. The City of Los Angeles* (United States District Court, Central District of Los Angeles, Number CV 77 0770 ALS) without any determination by the subdivision process. In that action, the developer claims that his property has been taken, because the engineering costs of development result in a negative value to his land unless he is given permission to build a greater number of dwelling units than that permitted under the slope/density formula.

In other words, the more marginal the land, the greater the density he must be permitted because of the expenses of site preparation.

That action is presently pending. *Amici* believe that the decision of this Court will directly affect the action below. It is for these reasons that *amici* believe that they are directly affected by the present appeal.

III

THE USE AND DEVELOPMENT OF LAND IS A PUBLIC ISSUE. PUBLIC INPUT IS ESSENTIAL TO DETERMINATION OF APPROPRIATE LAND USE.

Land is a public issue. As the California Legislature declared in enacting the *State Subdivision Map Act:*

> ". . . California's land is an exhaustible resource, not just a commodity, and is essential to the economy, environment and general well-being of the people of California. It is the policy of the state and the interest of the Legislature to protect California's land resource, to insure its preservation and use in ways which are economically and socially desirable in an attempt to improve the quality of life in California." *California Government Code* §65030.

Property rights do not confer upon the owner of land the absolute right to do what he wants with his land. Historically, the right of an owner to use or develop land to his own economic advantage was deemed subordinate to the rights of the community to be protected from unhealthful, unsafe or burdensome consequences of land use. The common law of nuisance, zoning law, and modern land use regulations have all developed from the fundamental premise that property rights are enjoyed under an implied limitation and must yield to the police power where the environmental, social, and economic well-being of the citizenry

is at stake. *H.F.H. Ltd. v. Superior Court,* 15 Cal.3d 508, 125 Cal.Rptr. 365, 542 P.2d 237 (1975), cert. denied 425 U.S. 904, citing *Carter v. Harper,* 182 Wis. 148, 153 (1923); *Pennsylvania Coal Company v. Mahon,* 260 U.S. 393 (1922); *Euclid v. Ambler Realty Company,* 272 U.S. 365 (1926); *Sierra Club v. Morton,* 405 U.S. 727 (1972).

The planning laws of the State and the requirements of local ordinance delineate the process by which the appropriate use of land is determined in California.

California State law mandates that local entities approve a General Plan (*California Government Code* §65300 *et seq.*). Public input is required (*California Government Code* §65304, §65351, §65355, §65356.1).

State law mandates consideration of the environmental impact of land use decisions. The authorized body must seek comment and review, as well as hold public hearings to determine that impact. *California Public Resources Code* §21000 *et seq.*

Zoning and subdivision procedures require public hearings and make provisions for appeals to the legislative body by citizens, as well as applicants, who are dissatisfied with the determinations made at the administrative level of government. *California Government Code* §66451, §66452.5; *Los Angeles Municipal Code* §17.00 *et seq.*

The public input in land planning is imbedded in the process of land use determinations in California.

IV

FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES PRIOR TO INITIATION OF AN INVERSE CONDEMNATION ACTION DEPRIVES CITIZENS OF THEIR VITAL RIGHT TO BE INVOLVED AND HEARD IN LAND USE DECISIONS WHICH DIRECTLY AFFECT THEM.

Amici have learned from long experience in the local land use decision-making process that without public input, cities

and counties respond to political pressure to increase the intensity of land use rather than to restrict its use. Absent citizen review and public hearings, there exists no imperative to give full consideration to the particular problems caused or exacerbated by a proposed development, nor to consider the cumulative impact of the development upon the surrounding communities. Public input is vital to the process in order to determine whether there exist public exigencies justifying restrictions on development rights.

The *Agins'* inverse condemnation strategy effectively eliminates all such citizen involvement and public dialogue.

In *Agins*, the owners of property have resorted to the judicial process directly instead of securing a governmental determination as to the density of permitted development on their land. As a result, no consideration was ever given to determination of the impact development would have on the surrounding community, nor was there any public debate over the appropriateness of any particular proposal.

As Justice Marshall noted in his dissent in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 14 (1974), land use regulations are complex, important, and essential to the quality of life in every community. They are the means whereby local governments insure that our cities and towns remain fit for humans to live in. It is public debate which shapes the determination ultimately reached by government as to what development of the land is reasonable under the circumstances. Such public debate is vital inasmuch as land use decisions have an irreversible, cumulative impact upon the community. With vacant land, the determination to change the nature of the property is irreversible.

By circumventing the requirement for a development proposal under the *State Subdivision Map Act* (*California Government Code* §66410, *et seq*. and appealing directly to the

judiciary for a determination that development rights have been "taken" within the meaning of the Fifth Amendment, *Agins* has eliminated the right of the public to be involved in the crucial, initial stage of the land use decision-making process.

It has also avoided the necessity for conforming to the separate environmental procedures mandated by State law (*California Environmental Quality Act, Public Resources Code* §21000 *et seq*.), the very purpose of which is to identify environmental consequences of the proposed development which may significantly affect the environment and to require mitigation measures at the proposal stages.

Immediate recourse to the courts would effectively eliminate citizen input. City and county halls are the only accessible forums for citizens seeking to be heard on individual land use matters which may directly affect them. Land use litigation is expensive, protracted, and discouraging, Citizen groups simply cannot garner the finances to intervene in case by case adjudications involving challenges to land use regulations. They cannot write off their litigation costs as a business risk, as can Appellants and their *amici* Nor can they pass on their costs to the public through demands on the public treasury, as can Appellees. They are dependent on the administrative process for consideration of their legitimate claims.

Unless the *Agins* inverse condemnation strategy is repudiated by this Court and exhaustion of administrative remedies is deemed vital to the continuing right of citizens to be publicly involved in local land use decisions, the role of the public in future land use decisions will be minimal.

Under threat of inverse condemnation, local governments, lacking the financial resources to regulate by purchase, will rarely be willing to offer resistance, but will find it more feasible to capitulate and permit a developer

to develop land to his own economic advantage no matter what the impact upon the citizenry and ultimately upon the city. Public dialogue will no longer serve as an effective counter-balance to the rights claimed by developers.

Eliminating citizen involvement and eliminating an administrative record by directly invoking the judicial process allows only one dominant view to be placed before the courts—the view that the right to exploit land for profit is inevitably in the public interest. *Amici* maintain that the question of whether the use and development of land is compatible with the natural carrying capacity of the land and the surrounding community is a public issue of such importance that public involvement should be required at the administrative level before the judicial process may be invoked.

V

WITH UNDEVELOPED LAND, FAILURE TO SECURE A GOVERNMENT DETERMINATION OF REASONABLE DENSITY BEFORE INITIATING AN INVERSE CONDEMNATION ACTION DEPRIVES THE JUDICIARY OF THE NECESSARY FACTS CONCERNING THE CHARACTER OF THE LAND, THE REASONABLENESS OF THE REGULATION, AND THE REALISTIC MARKET VALUE OF THE LAND.

A. Land Is Both a Resource and a Commodity.

When an owner makes the decision to convert undeveloped land from a marketable commodity into a developed resource, his use of his land becomes subject to the reasonable exercise of the police power.

Land is a commodity only for the purposes of valuation in the market place. In societal terms, land is a finite resource for which the range of allowable density of development, in order not to be injurious to the community, must

be compatible with the natural carrying capacity of the land itself, adjacent lands, and available public resources.

By invoking judicial relief directly, Agins' right to develop land to his own economic advantage is considered in the abstract as though his land were merely a private commodity.

Amici ask this Court to note that there is a basic two-fold assumption in all of the briefs filed in support of Appellants that *amici* contend is in error. It is the assumption that all unimproved land may be improved to a higher intensity and that higher intensity use will always result in a social good.

The *Agins'* argument assumes that land remains a commodity when it is developed; that future development transactions affecting land are private transactions; that the purpose of exploiting land is to maximize profit in accordance with the principles of a free market economy; that public expectations and governmental restrictions concerning the use and development of land are an interference with the profit expectations of the owner; and that restrictions imposed which curtail development rights, whether reasonable or unreasonable, are a taking of the development potential that cannot be realized in the market place. It is for the loss of that development potential that Appellants seek just compensation under the Constitution.

If improving land to a higher intensity use always resulted in a social good, as Appellants maintain, planning laws would not be necessary. Rather, they would create arbitrary and capricious obstacles to the process by which land is continuously improved to its highest and best use.

Ideally, what the market place strives for—the intensification of land use and the creation of capital—the planning process resists at the point at which local government de-

termines that a proposed development will result in identifiable social harm rather than social good.

A governmental determination that a particular development is more burdensome than beneficial may be based on knowledge that was not available to it in past times. Its assessment of the impact of development depends on the level of knowledge of the society it represents. Societal concepts of what is harmful become more sophisticated as communal wisdom increases. As Curtis Berger has said,

> "(As) our scientific and technological understanding expands, we find that activities once thought innocent may cause incalculable harm." Curtis Berger, *The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis*, 76 Colum.L.Rev. 799, note 5 at 823 (1976).

The Agins' action seeks to hold the local legislature liable for a change in its perception of public interest. In dealing with the important issue of State liability for repeal of emission control legislation which resulted in market loss to the manufacturer of smog control devices, the California Second District Court of Appeal has just considered the issue and has unequivocally stated:

> "A Legislature is not liable, nor is the State liable, for a change in its perception of public interest. Many things once thought desirable, or even to be encouraged, are later thought to be undesirable and to be discouraged. An investment under the earlier legislation is not protected against a change in the Legislature's views of desirability." (*Dana Corporation, et al. v. State of California*, 80 Daily Journal D.A.R. 743 (C.A. 2nd, March 13, 1980).

While local governmental determinations respecting land may be imperfect and imprecise, it is the legislature which

must first determine that, for example, the harm resulting from traffic congestion and fire danger in the steep hillsides and canyons where *amici* reside, or the negative impact on the city treasury which may result from providing public services needed by the proposed development, outweighs the benefits of permitting the building of the number of new homes required to insure a profit to the developer who proposes to build them.

The local land use process is a means whereby the private expectations of the developer are reconciled with the public expectations concerning reasonable land use. At that point, the owner's development rights are established in relation to the society as a whole.

It is the intersection of private enterprise, driven by the desire for profit, with local government, motivated by political considerations, which allows for harmonizing development rights with the public good. That balancing process is lost when the developer appeals directly to the judiciary to determine in the abstract whether all or part of his anticipated development rights have been "taken".

Development of land is a public issue. Important questions of public policy permeate every decision regarding the use of land, because the decision has direct and measurable impact upon citizens adjacent to the development and upon the quality of life for the entire community. *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978).

B. In Order to Determine Whether the Regulation Is Reasonable, the Character of the Regulation Must Be Evaluated In Light of the Carrying Capacity of the Land to Be Developed.

Land use regulations must be considered in connection with the circumstances and the locality in order to determine

whether the police power has been properly exercised. *Euclid v. Ambler Realty Company*, 272 U.S. 365, 388 (1926).

Appellants are asking the judiciary to supplant the governmental decision process and to determine, preliminarily, whether development expectations of the Appellants are compensable without a determination of whether such expectations are reasonable in light of the development capability of the land and the impact upon the surrounding communities.

In order for the judiciary to make such a determination, the land use allocation actually established for Appellants' property must be known. Under the zoning applicable to Appellants' property, one dwelling unit per acre may be permitted, but since there is no development plan on record, the Court cannot determine whether that density would be appropriate for the property.

Of crucial significance to the validity of Appellants' claim is the disclosure of the character of the land and the development density desired by the developer. The record before this Court merely discloses that Appellants' land lies in a hillside area; natural conditions on the land which would inhibit development are not disclosed. Until the subdivision application is processed, the Court cannot determine whether it is the regulation or the land itself which restricts development.

It is reasonable for government to impose stringent land use regulations on land that is of marginal quality and hazardous to develop. Where the character of the land in its natural state has been unuseable for generations because it is precipitous, hilly, rocky and brush-covered, where extensive grading is necessary, where traffic access is severely limited, where fire hazards are high, and where the availability of public services is difficult and expensive to provide, lesser density is often compelled by the circumstances.

Where the nature of the land so dictates, the conflict between the goals of the market place and the community become most pronounced. On the one hand, environmental, social, and economic factors militate against permitting maximum development of marginal land. On the other hand, to the developer, the marginal nature of the land will mean that the development costs will be much greater.

By exercising an inverse condemnation strategy without exhaustion of administrative remedies, a determination as to what development potential of the land is reasonable under the circumstances is not known. If the restriction does, indeed, substantially affect the market price of the land, the effect may be due to discovery of the inherent limitations of the land itself. The regulation may be compelled by the nature of the land and the need to protect the public and the public fisc.

The right to exercise the police powers that reasonably restrict realization of market potential has long been recognized by the judiciary.

In *City of Walnut Creek v. Leadership Housing Systems, Inc.*, 73 Cal.App.3d 611, 140 Cal.Rptr. 690 (1977), the owner of 134 acres of hillside land applied for a development permit that would permit a maximum of 139 dwelling units on 39 acres of the property. The City turned down the permit on the grounds that the significant hazards posed by the development included: extensive grading, inadequate access to proposed open-space areas, potential slide hazard areas, and increased traffic on roads already at over-capacity. The judiciary, in upholding the City's determination, was apprised of the unique features of the land. It was therefore aware that denial of the proposed development was not unreasonable given the natural features of the land.

In *Metro Realty v. County of El Dorado*, 222 Cal.App.2d 508, 35 Cal.Rptr. 480 (1963), the issue was whether a county could impose á three-year moratorium on the development of land in an area designated for reservoir use. The developer had filed a subdivision map application requesting single family residential development for the property. The Court reviewed the administrative records and concluded that the regulation was reasonable because

> "(1) plaintiff is not being singled out as a lonely object of regulation. The ordinance affects *all* new would be homes subdividers within 31 potential reservoir sites spread throughout the entire county; also (2) the lands here involved have been unused and unuseable for generations. They are precipitous or hilly; rocky, brush-covered; (3) there are no subdivisions in the immediate vicinity. An attempt to launch a home site development on plaintiff's land would be a pioneering adventure." *Id.* at 513.

These cases establish that whether a regulation can prohibit a development is directly dependent on the determination of whether the land will accommodate the development proposed.

C. Economic Loss as Measured by Fair Market Value for Undeveloped Land Cannot Be Determined Until the Public Process Has Revealed the Actual Development Potential of the Land.

The fair market value of undeveloped land, where there has been no governmental determination respecting its reasonable use, includes an economic potential for development that may not be realistic. This is so because although the value of land as a commodity increases as the land available for building becomes more scarce, the value of the land determined in accordance with the development

permitted under applicable regulations may be significantly less.

Prior to the time that application to develop vacant land is made to local government, the fair market value of the land is determined in the abstract. The value may reflect existing zoning (which may or may not be realistic) and the probability of a zone change, but the value may not reflect unknown impediments to development. These may be discovered only when application for a subdivision is processed. The limitations of development potential may be either inherent frailties in the land itself or may result from the impact of development on the surrounding community.

It is only once a determination has been made as to whether the land is reasonably suited for the density of development proposed, after such factors are considered as ecological necessity, location and availability of roads and public utilities, impact upon surrounding communities, and economic facts of significance to government as well as the developer, that the land assumes a fair market value which accurately reflects its development potential.

By bypassing a governmental determination, Appellants claim a speculative measure of damages which may or may not be realistic. Absent the administrative record, the judiciary is unable to ascertain whether the measure of damages is reasonable, because the market value of the land as determined by appraisal before the inherent limitations have been discovered and publicly debated may be different than the appraisal value that could be calculated after full disclosure of the realistic development potential of the land.

In *Village of Belle Terre v. Boraas*, 416 U.S. 1, 14 (1974), Justice Marshall noted in his dissent that the judiciary should resist the opportunity to sit as a Board of Zoning Appeals in reviewing governmental judgments concerning

land use allocations so as not to impede local governments from devising effective land use controls in the future.

Today, Appellants would urge that the judiciary recognize an inverse condemnation action which involves complex land use regulations without first allowing local government (and its citizenry) to determine what the appropriate land use allocation should be in light of all the particular circumstances surrounding the proposed development. The judiciary is being asked not to sit as a Board of Zoning Appeals, but rather to supplant itself for the local legislature by determining that there is a minimum density that can be assigned to the Agins' property below which the local entity may not limit the Agins without providing them with a cash outlay from the public treasury.

As Justice Rehnquist reaffirmed in *Kaiser Aetna v. United States* (.... U.S. ...., 100 S.Ct. 383, 391 (1979)): ". . . The life of the law has not been logic, it has been experience.", citing Justice Holmes.

Experience rather than logic of law evolves from a weighing of the facts of each particular case. By invoking an inverse condemnation action directly without an administrative record to establish the essential facts, Appellants seek a judicial determination which is based solely on abstract principles of law.

The distinction is especially critical in the land use context. Local land use regulation viewed in the abstract is general and theoretical. The land use process works only when decisions are made on individual facts by local government determined in light of experience with such

> ". . . unanticipated and often unforeseeable events (such as): social and political changes, ecological necessity, location and availability of roads and utilities, economic facts (especially costs of construction and financing), governmental needs, and as important as any, market and consumer choice." Dissent of Justice Powell in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 682, n.3, citing *Kropf v. City of Sterling Heights*, 391 Mich. 139, 168, 215 N.W.2d 179, 191-192 (1974).

In order for the local land use process to work, it must first be invoked. Local government then has an opportunity to apply its experience to the facts. Following a local governmental determination concerning the magnitude of the proposed development, the applicant will resort to the judicial process for redress, if necessary. The judiciary, as the final arbiter on the question of whether the land use allocation to the developer was reasonable, has the experience of all of the affected parties, including the citizenry, contained in the record before it as the basis for applying the law.

That is the law of experience, which *amici* respectfully asks this Court to uphold.

VI

DEVELOPMENT RIGHTS ARE NOT COMPENSABLE UNDER THE JUST COMPENSATION CLAUSE.

A. General Plans and Zoning Laws Do Not Give Rise to Inverse Condemnation Actions.

Land use designations under the planning and zoning laws are comprehensive, long-range planning controls enacted by local government in response to foreseeable community needs. Unforeseeable future changes in the community will likewise necessitate changes in the regulations enacted.

> "Legally, all zoning enabling acts contemplate the possibility of dezoning, the power to amend zoning ordinances serving that purpose. The provisions do not

show in their face whether they are intended to remedy particular errors or hardships, or whether they contemplate readjustments called for by the changing character of neighborhoods; undoubtedly, however, they may be made available for either purpose." *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 682, n.3 (1976), citing Freund, *Some Inadequately Discussed Problems of the Law of City Planning and Zoning*, 24 Ill.L.Rev., 135, 145 (1929).

Where there has been no conduct of any public agency which has directly interfered with the owner's use of the property, any impact upon the property resulting from general land use regulations is non-compensable. *H.F.H., Ltd. v. Superior Court*, 15 Cal.3d 508, 125 Cal.Rptr. 365, 542 P.2d 237 (1975); *Selby Realty Company v. City of Buenaventura*, 10 Cal.3d 110, 109 Cal. 799, 514 P.2d 111 (1973); *People Ex Rel. Department of Public Works v. Peninsula Enterprises, Inc.*, 91 Cal.App.3d 332, 153 Cal.Rptr. 895 (1979); *Friedman v. City of Fairfax*, 81 Cal.App.3d 667, 146 Cal.Rptr. 687 (1978); *Smith v. State of California*, 50 Cal.App.3d 529, 123 Cal.Rptr. 745 (1975).

Moreover, land use regulations which impose a temporary moratorium on development in particular areas and which affect all property owners similarly have been consistently upheld by California courts on the theory that the right to develop land is subject to the rights of society to have a reasonable opportunity to develop solutions to substantial social, economic and environmental problems posed by development in certain areas. *Avco Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal.3d 785, 800-802, 132 Cal.Rptr. 386, 553 P.2d 546 (1976); *State of California v. Superior Court* (*Veta Company*), 12 Cal.3d 237, 252-255, 115 Cal.Rptr. 497, 524 P.2d 1281 (1974).

Under the authority of the preceding cases, any impact upon Appellants' property resulting from the general land use controls adopted by the City of Tiburon does not give rise to an inverse condemnation action because it does not interfere with the use to which Appellants are presently devoting their property.

Finally, it must be noted that land use restrictions, by their nature, are temporary. They may be changed, upward or downward, depending on the technological accomplishments of the society, the needs of the community, and the knowledge of the decision-makers. Compensation for a reasonable change in regulations would provide an unwarranted windfall for those who speculate in land.

As the California Supreme Court stated in *H.F.H., Ltd. v. Superior Court*, 15 Cal.3d 508, 125 Cal.Rptr. 365, 542 P.2d 237 (1975),

". . . (Z)oning is not an arbitrary action depriving someone of property for the purpose of its use by the public or transfer to another; rather it involves reciprocal benefits and burdens which the circumstances of this case well illustrate. The shopping center which plaintiffs seem at various times to have contemplated erecting, would derive its value from the existence of residential housing in the surrounding area. That residential character of the neighborhood, we may assume, results in part from the residential zoning of the area around the tract in question. As one of the plaintiff's amici has written in another context, '(W)hile one can conceptually separate windfalls caused by government (e.g., by zoning actions) from those caused by the community, they are very hard to disentangle and measure.' " *Id.* at 520-521, citing Hagman, *A New Deal: Trading Windfalls for Wipeouts* (1974), 40 Planning 9.

B. Development Rights Are Not Cognizable at Law Until Such Time as a Property Owner Has Secured a Governmental Determination That He Is Entitled to Reasonably Adapt His Property to an Expanded Use and Until He Has Been Granted the Applicable Governmental Permit.

Development rights are one species of economic interests. They may be actual (*e.g.*, reasonably bound up with existing utilization of land—as where an owner has instituted a use on the property or has secured a building permit and commenced improvements) or they may be speculative (*e.g.*, based upon the highest and best use of the land as a commodity in accordance with fair market value principles). *Amici* maintain that only presently used development rights are considered property for purposes of determining whether at some point a regulation may constitute a "taking".

In *United States v. Willow River Company*, 324 U.S. 499, 502 (1945), this Court emphasized that:

> ". . . (N)ot all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them and only when they are so recognized may courts compel others to forebear from interfering with them or to compensate for their invasion."

With undeveloped land, Appellants have no right to rely on existing zoning:

> "A property owner acquires no vested right as against future zoning merely by purchasing real property (*Anderson vs. City Council* (1964), 229 Cal.App.2d 79 (40 Cal.Rptr. 41)), and by zoning the property the government makes no representation to the landowner that he will be exempt from the zoning laws in effect at the time he applies for his permit. (*Avco Community Developers, Inc. vs. South Coast Regional Com.* (1976), 17 Cal.3d 785 (132 Cal.Rptr. 386, 553 P.2d 546)." *Toso v. City of Santa Barbara*, 80 Cal.App.3d 664, 665, ... Cal.Rptr. .... (1979).

Appellants' development rights, with respect to undeveloped land for which no governmental permit has been secured, consists merely of the right to continue a use already instituted, not to capitalize an anticipated profit. *Anderson v. City Council*, 299 Cal.App.2d 79, 40 Cal.Rptr. 41 (1964); *Brown v. City of Fremont*, 75 Cal.App.3d 141, 147, 142 Cal.Rptr. 46 (1977).

Appellants have not raised a cognizable "taking" claim simply by alleging loss of speculative development rights. In *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 130 (1978) this Court stated:

> ". . . (T)he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable."

In previous cases this Court has recognized inverse condemnation actions involving injury to development rights only where the economic interests are tied to a use already instituted on the property. *Penn Central Transportation Company v. City of New York, supra; Kaiser Aetna v. United States*, ... U.S. ...., 100 S.Ct. 383 (1979); *Andrus v. Allard*, ... U.S. ...., 100 S.Ct. 318 (1979) (economic interests as related to commercial goods already in existence). In each of those cases, the economic interests were considered "sufficiently bound up with the reasonable expectations of the claimant so as to constitute 'property' for Fifth Amendment purposes." *Penn Central Transportation Company v. City of New York, supra*, at 125.

The economic interests (and resulting injuries claimed) were insufficient, standing alone, to constitute cognizable property interests under the Fifth Amendment for which just compensation was required. It was only where the economic interests were coupled with the property right deemed more fundamental under the Constitution — the "right to exclude others" from interfering with an existing use of the property — where just compensation was required. *Kaiser Aetna v. United States, supra*. See also *United States v. Causby*, 328 U.S. 256 (1946) (governmental taking of an air easement compels just compensation.)

Where the government takes land under the eminent domain power, speculative development rights are not cognizable.

In *United States v. Twin City Power Company*, 350 U.S. 222 (1956), the government was not required to compensate the land owner when it acquired fast lands to improve navigation for certain elements of damage attributable to riparian location, such as the land's value as a hydroelectric site.

Nor in *United States v. Rands*, 389 U.S. 121 (1967), was the government required to compensate the land owner for the land's potential as a port site.

All that the Fifth Amendment requires is a "full and perfect equivalent for the property taken". *Monogahela Navigation Company v. U.S.*, 148 U.S. 312, 326 (1893).

This Court has held that restrictions on development rights, such as building on portions of property deemed unsuitable, goes fundamentally to the heart of the police power without giving rise to an inverse condemnation action. *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Welch v. Swasey*, 214 U.S. 91 (1909) (height restriction); *Gorieb*

v. Fox, 274 U.S. 603 (1927) (requirement that portions of parcels be left unbuilt).

Moreover, where the anticipated use of the property would inflict injury upon the community, partial or total curtailment of the use being made on the real property has likewise been sustained under the police power without giving rise to an action for damages under the "taking" clause. *Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Miller v. Schoene*, 276 U.S. 272 (1928).

Allowing speculative development rights to be considered property rights for Fifth Amendment purposes when they are not considered property rights under state law until they have vested, will place local governments in a legally anomalous and impossible position. They will be compelled either to recognize speculative development rights and permit a higher intensity use, even when they determine that the density is harmful to the community, or they will be compelled to purchase such development rights in order to prevent the developer from causing injurious impact to the community.

The absurdity of requiring such a choice to be made can be seen by its suggested effect on two recent court determinations.

In *Turner v. County of Del Norte*, 24 Cal.App.3d 311, 101 Cal.Rptr. 93 (1972), the County of Del Norte would either have had to purchase Turner's flood-prone land or would have been required not only to permit building on a flood plain subject to dangerous flooding, but to permit a metropolitan complex to be built near the Klamath River of sufficient density to cover the expense of raising Turner's land above flood plain level.

In *Kopetzke v. County of San Mateo Board of Supervisors*, 396 F.Supp. 1004 (N.D. California 1975), the Board of Supervisors would either have had to purchase hazardous fault-prone property or would have had to permit not only the sale of the hazardous, unstable land owned by Kopetzke, but also the building of the number of units required to insure correction of all the faults and hazards inherent in the land so as to make the property marketable.

If Appellant's strategy is successful, and the just compensation clause of the Fifth Amendment is expanded to include development potential, whether realistic or not, then the government will be required to compensate owners who seek to maximize their economic advantages in order to prevent them from doing harm to society. That is the ultimate conclusion of Appellants' argument.

VII

THE SPECULATIVE FAIR MARKET VALUE OF UNDEVELOPED LAND PROVIDES AN INFLATED MEASURE OF DAMAGES IN AN INVERSE CONDEMNATION ACTION.

Finally, where there is no existing economic use on the land (or a governmental determination as to reasonable use), economic injury based on fair market value creates a false measure of damages.

As this Court said in *Andrus v. Allard*, ... U.S. ...., 100 S.Ct. 318, 327 (1979);

> "Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interests in anticipated gains has traditionally been viewed as less compelling than other property related interests."

Appellants, while they argue that they are entitled to compensation whether or not the regulation is reasonable,

paradoxically seek a measure of damages comparable to that provided in a tort action. If there has been no unreasonable action, there has been no wrong.

Even were the Court to recognize that a governmental regulation may, under some circumstances, give rise to an action in inverse condemnation, loss of potential development profits is an inappropriate measure of damages in any action arising under the just compensation clause.

VIII

CONCLUSION.

Appellants here have attempted by this action not only to bypass the land use approval process of local government and to eliminate public debate in the determination of land use decisions, but to substitute potential for profit for just compensation as the measure of damages in inverse condemnation.

Amici respectfully submit that the just compensation clause was never intended to force governments to make the kinds of choices proposed by Appellants. For all of the reasons that *amici* have stated, they urge the Court to affirm the decision below.

Respectfully submitted,

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FOR ARGUMENT

Supreme Court, U.S.
FILED
MAR 25 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AND BONNIE G. AGINS,
Appellants,

v.

CITY OF TIBURON,
Appellee.

On Appeal From the Supreme Court
of the State of California

BRIEF OF THE CONSERVATION FOUNDATION, ENVIRONMENTAL DEFENSE FUND, NATIONAL AUDUBON SOCIETY, NATIONAL CENTER FOR PRESERVATION LAW, NATIONAL CONFERENCE OF STATE HISTORIC PRESERVATION OFFICERS, NATIONAL PARKS AND CONSERVATION ASSOCIATION, NATIONAL TRUST FOR HISTORIC PRESERVATION, NATIONAL WILDLIFE FEDERATION, PRESERVATION ACTION, AND SIERRA CLUB AS AMICI CURIAE IN SUPPORT OF APPELLEE

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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OCTOBER TERM, 1979

No. 79-602

DONALD W. AND BONNIE G. AGINS,
Appellants,

v.

CITY OF TIBURON,
Appellee.

On Appeal From the Supreme Court of the State of California

BRIEF OF THE CONSERVATION FOUNDATION, ENVIRONMENTAL DEFENSE FUND, NATIONAL AUDUBON SOCIETY, NATIONAL CENTER FOR PRESERVATION LAW, NATIONAL CONFERENCE OF STATE HISTORIC PRESERVATION OFFICERS, NATIONAL PARKS AND CONSERVATION ASSOCIATION, NATIONAL TRUST FOR HISTORIC PRESERVATION, NATIONAL WILDLIFE FEDERATION, PRESERVATION ACTION, AND SIERRA CLUB AS AMICI CURIAE IN SUPPORT OF APPELLEE

INTEREST OF AMICI

Pursuant to Supreme Court Rule 42(2), the above listed organizations file this brief as Amici Curiae in support of Appellee. Counsel for the parties have con-

sented to the filing of this brief, and letters of consent have been filed with the Clerk.

Amici are national organizations concerned with the protection and promotion of the natural and built environment. Amici have a combined U.S. membership which exceeds three million. All Amici have a major interest in the encouragement of environmentally and economically sound land use regulation and policy at all levels of government and are seriously concerned by the implications for environmental, preservation and land use regulations unless this Court sustains the decision below. A more detailed description of each Amicus appears in Appendix A to this brief.

QUESTIONS PRESENTED

1. Whether, where the California Supreme Court, in accordance with long-established, independently-grounded state rules of practice and procedure, took judicial notice of the City of Tiburon's ordinances and actions, and based upon that judicial notice concluded that Appellants' creditable allegations would not, if true, establish that the zoning ordinance was unconstitutionally overburdensome since Appellants retained reasonable use of their property, the court was obligated nonetheless to order a trial of Appellants' claims?[1]

2. Whether, when a regulatory ordinance not intended to condemn property is found to burden property unconstitutionally, state courts must award damages or whether they instead may award appropriate

[1] As discussed below, Amici believe that the California Supreme Court's disposition of this issue was plainly correct. Accordingly, Amici believe that the second question need not be reached in resolving the present case.

declaratory or injunctive relief to insure that the property involved is not impermissibly burdened?

STATEMENT OF THE CASE

Appellants' presentation of the case, which makes claims of unconstitutional burdening based upon their allegations, ignores the factual context of the case. Because, as discussed below, the California courts, acting in accordance with long-standing state procedural rules, took judicial "notice of the zoning ordinances and actions of the city," *Agins* v. *City of Tiburon,* 145 Cal. Rptr. 476, 477 (Cal. App. 1978), and limited Appellants' allegations in accordance with the judicially noticed facts, Amici believe it is important that the Court understand the context in which the Agins' case was considered by the California courts.

1. *The Agins' Property.* In October 1968, Appellants Dr. Donald W. and Bonnie G. Agins ("Agins") purchased the five-acre parcel involved in this litigation. The public record documents show that the Agins paid a total price of $50,000 for the property.[2] At the time the Agins purchased the property, it was zoned by the City of Tiburon—under the ordinance which preceded the ordinance challenged here—as "RO-1—residential, open zone (one acre)." City of Tiburon Ordinance No. 9 N.S., Section 10-3.[3] The RO-1 zoning permitted

[2] The Agins' deed, a copy of which is Appendix B to this brief, shows recording taxes of $55. Under California law, recording taxes must be paid at a rate of $.55 per $500 of value. Cal. Rev. & Tax. Code §§ 11911 *et seq.* Thus, the deed upon its face showed a purchase price of $50,000. *See* Federal Rules of Evidence, Rule 201; Cal. Evidence Code §§ 450-59.

[3] Relevant portions of the text of this ordinance are reprinted as Appendix C to this brief.

the Agins to construct a maximum of five residential single family units on their five acre property, provided they complied with certain other regulations.[4] The Agins took no action to develop their property.

2. *The California Open Space Enabling Legislation.* In the 1950s and early 1960s, California, which was strongly growth oriented and placed very few restrictions on land developers, experienced substantial population influx and, as a result, tremendous development pressures. Developers built subdivisions on mountains, in canyons and dry river beds, and at other unsuitable localities. The environmental qualities which had originally attracted people to California suffered dramatically. Major disasters requiring substantial federal and state emergency aid occurred in urban and suburban residential areas as homes were washed away and people killed by floods and landslides.[5] In brief,

[4] In order to construct the residential units which the zoning then permitted, the Agins were required to subdivide the property in accordance with local regulations and, after 1970, were further required to comply with the California Environmental Quality Act of 1970, Cal. Pub. Resources Code §§ 21000 *et seq.* The Agins do not allege, and the record does not show, that they ever made any attempt to comply with these state and local regulations.

[5] Accounts of the most recent such events, which took place less than a month ago in southern California, are contained in, *e.g.*, *Newsweek*, "A Plague of Rain and Mud," March 3, 1980, p. 33 ("Even before the storms subsided, critics began blaming Los Angeles public officials for allowing developers to build homes in the disaster-prone canyons and hills."); *Los Angeles Times*, Feb. 16, 1980, p. 1; *Los Angeles Times*, Feb. 18, 1980, pp. 1, 3; *Los Angeles Times*, Feb. 19, 1980, pp. 3, 16. Interestingly, as a result of these events, some of the California attorneys who have filed a brief in this litigation on their own behalf (*see* brief of Messrs. Goldstein, Fadem, *et al.*, in support of Appellants) reportedly announced that they were considering "inverse condemnation" suits against the City of Los Angeles and other area

in the space of two decades, California became the nation's most urbanized state, and the unplanned California urban sprawl led to serious concern on the part of citizens and state and local agencies. *See, e.g., Selby Realty Co.* v. *City of San Buenaventura,* 10 Cal. 3d 110, 120, 109 Cal. Rptr. 799, 805, 514 P.2d 111, 117 (1973).[6]

In the mid-1960s and early 1970s the California state legislature responded to development pressures by establishing a number of land use planning mechanisms. Among these was open space legislation. In 1966, the

governments for failing to properly control development of hillsides and other areas subject to mudslides, slippage, flooding, etc. *National Law Journal,* March 10, 1980, pp. 3, 18.

An excellent, if unintentional, description of the pressures which in the absence of land use planning can lead to the types of environmental disasters reported in the foregoing articles is contained in the brief amicus curiae in this case filed by Half Moon Bay Properties, Inc. ("HMBPI"), at 3-5. HMBPI there contends that because it has acquired undeveloped hillside and mountain property it must now be allowed to build thousands of residences on the property without regard to the planning authorities' judgment as to the property's unsuitability for urban development.

[6] See also Population Research Unit, California Department of Finance, Net Civilian Migration (1979). Much of the development pressure in California has been concentrated in its coastal areas. One-third of the land in the California coastal counties is publicly owned and uninhabited, yet 65 percent of the State's more than 20 million people reside in these 15 counties. Research Department, Security Pacific Bank, California Coastal Zone Economic Study: Profile 2-1, 3-1 (April, 1975). Indeed, the development pressure on the San Francisco Bay area, where Tiburon is located, was so great that by 1959 filling, development and pollution had reduced the Bay's water surface from 680 to 400 square miles. R. G. Healy (ed.), Protecting the Golden Shore 7 (1978); see also, R. Odell, The Saving of San Francisco Bay: A Report on Citizen Action and Regional Planning (1972).

California legislature enacted statutes authorizing counties and cities to acquire, by purchase or gift, "open spaces and areas," and authorized the use of eminent domain for these purposes. Cal. Gov. Code §§ 6950-54. In 1971, the legislature extended its open space legislation by requiring all California cities and counties to adopt open space plans and to enact "open-space zoning ordinance[s]" consistent with these plans. Cal. Gov. Code §§ 65563, 65566, 65567, 65910.[7]

Thus, the California legislature, in enacting its open space planning laws, placed two quite different mechanisms at the disposal of California's cities and counties. First, it *authorized*—but did not require—cities and counties to acquire "open space" properties by the use of public funds, whether through the use of eminent domain or by negotiation. Second, the legislature *required* cities and counties to adopt open space zoning ordinances through the use of their regulatory powers. It was the specific intention of the California legislature that cities and counties use their regulatory open space zoning powers in a manner which would not unreasonably burden privately-owned properties:

> "The legislature hereby finds and declares that this article is not intended, and shall not be construed, as authorizing the city or the county to exercise its power to adopt, amend or repeal an open-space zoning ordinance in a manner which will take or damage private property for public use without the payment of just compensation therefor." Cal. Gov. Code § 65912.[8]

[7] These sections are reprinted in Appendix F to the Jurisdictional Statement at 47-48, 52. The California statutes required each city and county to adopt an interim open space plan not later than August 31, 1972 and a permanent open space plan not later than December 31, 1973. Cal. Gov. Code § 65563. *See* Appendix F at 51.

Appendices to the Jurisdictional Statement are cited hereafter by letter. Other abbreviations used are "Br." for Appellants' Brief and "J.A." for the Joint Appendix.

3. *Tiburon's Open Space Planning.* Pursuant to the mandate of the California legislature, beginning in January 1972, the City of Tiburon hired financial and planning consultants to advise it in the creation of an open space plan and with respect to obtaining financing for any properties to be acquired. The recommendations of the open space planning consultants and the financial consultants, taken jointly, were that the city should issue bonds in the amount of $1.25 million to purchase approximately thirty acres of then undeveloped land in the City of Tiburon, including the Agins' parcel, and adopt open space zoning which would take account of environmental factors in future development. *See* California Municipal Finance, City of Tiburon, Open Space Acquisition Financing (July, 1972) and Tiburon, Open Space Element Text (March, 1973). The City of Tiburon did ultimately issue bonds as suggested by its financial consultants, and in the period 1973 through 1977 acquired by negotiated purchase a number of properties.[9] It did not, however,

[8] Appendix F at 53.

[9] Among the properties purchased by the City since its dispute with the Agins started are three parcels on the same ridge where the Agins' property is located. In 1973, the City purchased the 25 acre Eavey property for $232,000. Tiburon City Council Minutes No. 329 (September 12, 1973). In 1975, the City purchased slightly under 13 acres of property from the School District for $175,000. Tiburon City Council Minutes No. 387 (July 28, 1975). And in 1977, the City purchased the ten acre Hamon property for $200,000. Tiburon City Council Minutes No. 447 (August 8, 1977). Based upon these purchases, it appears that the value of the

follow the financial consultants' recommendations and it never purchased any of the property that the financial consultants considered. *See Agins* v. *City of Tiburon, supra,* 145 Cal. Rptr. at 482 n.2.

On June 28, 1973, the City of Tiburon enacted Ordinance 124 N.S., which is the subject of this litigation. Ordinance 124 N.S. ("the open space zoning ordinance") rezoned the Agins' (and other) property from RO-1 to RPD-1.[10] Prior to the change, as discussed above, the zoning law permitted the Agins to build one house per acre, or a maximum of five on their property. Under the new zoning ordinance, the Agins are permitted to build not less than one nor more than five residences on their property, as determined by the City Planning Commission and City Council upon the owner's request and based upon standards set forth in the ordinance.[11] The Agins do not allege, and there is nothing in the record to suggest, that they ever made a request to the City authorities that any residential construction be permitted on their property.

4. *The Agins/Tiburon condemnation dispute.* On October 15, 1973, the Agins filed a claim with the City of Tiburon alleging that the rezoning of the Agins' property by Ordinance 124 N.S. and that the reference to the property in that zoning as "open space" prevented any sale of the property and so burdened the

Agins' property at the time they brought the present lawsuit was probably between $50,000 and $100,000. The Agins' claim, of course, is for $2 million.

[10] Appendix E at 41-46.

[11] Appendix D at 30-33. In addition, as under the old zoning ordinance, prior to construction of any residences on their property, the Agins are required to comply with the applicable subdivision and environmental provisions.

property as to constitute a "taking" of the property without just compensation.[12] The City denied the Agins' claim, but on December 4, 1973, instituted an eminent domain proceeding against the Agins. Approximately a year later the City abandoned its effort to acquire the Agins' property.[13] In accordance with California law, Tiburon was permitted to drop its condemnation suit upon the payment of the Agins' expenses.[14] The City paid the Agins $4,500 in costs and the proceeding was abandoned.[15]

5. *The Present Lawsuit.* The Agins filed the present lawsuit on June 4, 1975, making essentially the following allegations.

First, in Count I, the Agins pled what their counsel apparently intended as a claim for damages allegedly resulting from impermissible interference with use of their property by the rezoning. They have referred to their action as one for "inverse condemnation."[16]

[12] Paragraph V of the Agins' complaint (J.A. 7) alleges that they filed this claim on October 15, 1972. However, the claim itself, a copy of which is attached as Exhibit B to the Joint Appendix (J.A. 21-23), is dated September 20, 1973, and refers to events of June, 1973. The California Court of Appeal found that the reference in Appellants' complaint to "October 15, 1972" was erroneous. *See Agins* v. *City of Tiburon, supra,* 145 Cal. Rptr. at 477 n.1.

[13] Complaint paragraphs XVII-XXV (J.A. 9-10).

[14] *See* Cal. Civ. Proc. Code § 1255(a); *County of Los Angeles* v. *Hale,* 165 Cal. App. 2d 22, 331 P.2d 166 (1958).

[15] *City of Tiburon* v. *Agins,* No. 69070 (Marin County Superior Court, May 20, 1975).

[16] This Court has recently recognized that the term "inverse condemnation" is simply a shorthand description for a money damage remedy to recover the value of property in circumstances which are the " 'inverse' or 'reverse' of a condemnation proceed-

Thus, in Count I the Agins' major factual allegations were that

> —the financial and planning consultants' reports, which had recommended the acquisition of certain property, including the Agins', to be maintained as permanent open space, had been fully incorporated by the open space zoning ordinance and that the ordinance was "limited in every respect to the terms . . . and completely restricted to the mandate" set forth in those reports; [17]
>
> —the city's then-abandoned attempt to condemn the Agins' property, as previously described, together with the "publication" of the city's activities, was intended to and did destroy the usefulness of the Agins' property; [18] and
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> —the result of the adoption of Ordinance 124 N.S. was to "forever prevent the development, for residential use or otherwise" and "to prevent any sale, use, transfer or development" of the Agins' property.[19]

As a result, the Agins sought "compensation" or "damages" in the amount of $2 million.

In Count II, the Agins alleged essentially the same facts and claimed that the open space zoning ordinance was null and void and unconstitutional for a variety

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ing"—that is, where instead of exercising its condemnation powers, a government physically seizes or occupies property, leaving it to the landowner to initiate proceedings. *United States* v. *Clarke*, 48 U.S.L.W. 4258, 4259 (March 18, 1980). As discussed below, this Court has not characterized a claim for damages resulting from supposedly burdensome regulations as "inverse condemnation."

[17] Complaint, paragraphs V-VIII (J.A. 5-7).

[18] Complaint, paragraphs XII-XXVII (J.A. 7-11).

[19] Complaint, paragraphs IV, IX (J.A. 5, 7).

of reasons. Among the reasons asserted were that the ordinance allegedly deprived the Agins of their property without compensation.[20] As a remedy for their claims in Count II, the Agins sought to have the zoning ordinance declared void as applied to their property and to have injunctive relief provided against its enforcement.

The City of Tiburon filed a demurrer to the complaint. A demurrer under California practice is similar, but not identical to, a motion to dismiss under Rule 12 of the Federal Rules of Civil Procedure. Under the California demurrer practice, a court must accept specific factual allegations as true unless they are contradicted by laws, ordinances, public documents or other items as to which the court must take judicial notice. In addition, conclusory allegations, legal or factual, are not binding. *See, e.g., Dale* v. *City of Mountain View,* 55 Cal. App. 3d 101, 105, 127 Cal. Rptr. 520, 522 (1976); Cal. Evidence Code §§ 452-53.

The trial judge granted the demurrer to both counts. With respect to the "inverse condemnation" count, the dismissal was without leave to amend. Under California practice, this meant that in the opinion of the trial judge the Agins could not state a cognizable claim for compensation—in other words, the trial court implicitly held that damages were not available as a remedy under the general circumstances alleged. 3 B.E. Witkin, *California Procedure: Pleading,* § 847 at 2451 (2d

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[20] Complaint, paragraph II (J.A. 11-13). The Agins' complaint also alleged, *inter alia,* that the open space zoning was not in conformity with the state open space requirements, was not pursuant to a valid open space plan, and was unrelated to proper police power objectives. The California Court of Appeal rejected all of these claims and the Agins did not pursue them further. *See Agins* v. *City of Tiburon, supra,* 145 Cal. Rptr. at 478-79.

ed. 1971). The trial judge dismissed the count for declaratory and injunctive relief with leave to amend. In California practice, this meant that the trial judge considered that the Agins had not set forth creditable facts sufficient, if true, to establish a "taking" for which invalidation of the open space ordinance would be required, but that such a remedy would be available if appropriate facts were alleged. 3 B.E. Witkin, *California Procedure: Pleading,* § 845 at 2450 (2d ed. 1971). Accordingly, the dismissal with leave to amend was designed to allow the Agins to plead additional facts, if such existed.[21] However, the Agins declined to amend their complaint and appeals followed, first to the California Court of Appeal and then to the California Supreme Court. The Supreme Court affirmed the trial judge's actions.

The decisions of the three lower courts have resolved a number of factual issues, as follows:

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[21] The City's demurrer also specifically raised lack of jurisdiction as an additional ground for dismissal. (J.A. 25). Under long established California law, a failure to exhaust administrative remedies in a zoning case is jurisdictional. Thus, California courts have held that exhaustion of administrative remedies must be specifically alleged. *Metcalf* v. *County of Los Angeles,* 24 Cal.2d 267, 269, 148 P.2d 645, 646 (1944); *Pan Pacific Properties, Inc.* v. *County of Santa Cruz,* 81 Cal. App. 3d 244, 248-52, 146 Cal. Rptr. 428, 431-33 (1978). The Agins had not exhausted their administrative remedies and did not so allege. As a result, the trial judge apparently sustained the demurrer on this ground as well. However, the California Court of Appeal, as noted below (*see* p. 13, n.24, *infra*) misread the Tiburon ordinance, incorrectly assumed that a variance was necessary for the Agins to build more than one residence, and declined to require them to seek a variance. The California Supreme Court corrected the Court of Appeal's erroneous reading of the zoning ordinance, but did not consider the jurisdictional issue.

(a) In accordance with California practice, the courts below took judicial notice of the Tiburon financial and planning reports and of the open space zoning ordinance. The California Court of Appeal held—and the Agins did not challenge in the California Supreme Court—that neither those plans nor the zoning ordinance required the City of Tiburon to purchase the Agins' property. 145 Cal. Rptr. at 478 n.2.[22]

(b) The California Supreme Court held that the so-called precondemnation activities described at pages 7-9, *supra,* including the abandoned condemnation suit by the City of Tiburon, were in accordance with the procedure established under the California statutes and did not constitute inpermissible interference with the Agins' property. (App. A at 14).[23]

(c) The California Supreme Court, again following California practice, took judicial notice of the fact that the Tiburon open space zoning ordinance allows the construction of between one and five residential units on the Agins' property.[24] (App. A at 13). Accordingly, the court held that on demurrer the Agins'

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[22] Appellants attempt to resurrect a variation of this unfounded factual claim by insisting that the City of Tiburon, when it adopted its open space plan, "determined that it must acquire the subject property . . . ." (Br. at 21, n.7). As the California Court of Appeal held, the city made no such finding.

[23] *Compare Brault* v. *Town of Milton,* 527 F.2d 730 (2d Cir. 1975) (en banc) (use of judicial processes in accordance with state law not a "taking" at least in absence of allegations of bad faith or sham).

[24] The California Court of Appeal apparently misread the zoning ordinance as limiting the development to one residence per five acres. 145 Cal. Rptr. at 481.

allegation that the ordinance "forever prevented" the development of the Agins' property for "residential or any other use" could not be credited.[25] Instead, for purposes of the demurrer, the Court held that the Agins' complaint must be treated as alleging that the City of Tiburon zoning ordinance authorized the construction of not less than one nor more than five residential units. The question was whether such an allegation would, if true, demonstrate that the zoning regulation was unconstitutional. (App. A at 13.)

This, then, is the factual posture of the case as it was before the California Supreme Court and, accordingly, as it is before this Court. In the circumstances of the case the California Supreme Court quite properly held that the Agins had not alleged creditable facts, which, if true, would show an unconstitutional burdening of the property. Although unnecessary to the disposition of the case, the California Supreme Court also stated that in the general circumstances of this case no damage remedy was available. This appeal followed.

SUMMARY OF ARGUMENT

1. *The California Supreme Court was plainly correct in dismissing the Agins' "taking" claim.* The facts

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[25] It is noteworthy that the Appellants did not make any specific allegations in this respect—for example, they did not allege that they had attempted to sell the property but could not, or that they had attempted to obtain building permits but could not. The California courts thus held that extremely general and conclusory allegations could not survive a demurrer where the applicable ordinance on its face was contrary to the allegations. In this respect, the California practice is generally similar to the rule of *Pacific States Box and Basket Co.* v. *White*, 296 U.S. 176 (1935), cited by this Court in *Lake Country Estates, Inc* .v. *Tahoe Regional Planning Agency*, 99 S. Ct. 1171, 1175 (1979).

of the Agins' case, which have been discussed in detail previously, are simple but important to the California Supreme Court's disposition of the case. The Agins bought the five acre property involved in this litigation in 1968 for $50,000. At the time of the purchase, and for some time previously, the property was zoned to allow a maximum of five single family residential units. After the State of California passed legislation requiring cities to enact open space zoning, the City of Tiburon modified its zoning to provide for a maximum of five and a minimum of one residential unit on the Agins' property. Thus, it is not clear that the rezoning has made any change at all in the permitted use of the Agins' property, and the Agins have not alleged otherwise. Indeed, the Agins never bothered to request permits to construct any residences on their property, not before the zoning change and not after. Instead, the Agins filed a lawsuit claiming that the open space zoning had deprived their property of "any purpose or use whatsoever" and sought an injunction and damages in the amount of $2 million, forty times what they had paid for the property seven years earlier.

The California Supreme Court examined the Agins' factual allegations in light of its judicial notice of Tiburon's "ordinance and actions" pursuant to the California procedure described at pages 11-14, *supra*. The court then held that the allegations as credited would not, if proven, show that the Agins were deprived of all reasonable use of their property and hence would not demonstrate an unconstitutional "taking." Accordingly, the court sustained the City of Tiburon's demurrer to the complaint. (App. A at 13.) The decision by the California court was without a doubt correct under this Court's precedents.

First, this Court has repeatedly held in police power regulation cases where no physical instrusion is involved that an unconstitutional burdening of property does not occur so long as the owner retains some reasonable use of the property. *E.g., Andrus* v. *Allard,* 100 S. Ct. 318 (1979); *City of Eastlake* v. *Forest City Enterprises, Inc.,* 426 U.S. 668, 674 n.8 (1976); *Hadacheck* v. *Sebastian,* 239 U.S. 394 (1915). This is precisely the test used by the California Supreme Court.

Second, applying the specific tests set forth in *Penn Central Transportation Co.* v. *City of New York,* 438 U.S. 104, 124-28 (1978), makes this point perfectly clear. Since there was not necessarily any change in the number of units allowable on the Agins' property, there was no significant economic impact and perhaps no interference with the owner's investment-backed expectations at all. The type of zoning ordinance involved here—a single family, one to five acre limitation—has been recognized as a reasonable police power objective in virtually every case to consider the matter, including the present case. And this is clearly not an instance of government action which could be characterized as an acquisition. The City did not make the Agins' property a park, nor require public access. This is a garden-variety zoning regulation and nothing more.

The Agins insist that having alleged an unconstitutional burdening of their property, which they say is a highly factual matter, they were entitled to a trial. But while many types of cases—including those in which a regulatory burden is claimed to be unconstitutional, *see Penn Central, supra,* 438 U.S. at 124—may often turn on factual questions, there can be no doubt

that disposal of such cases on motions to dismiss, summary judgment, and the like can be appropriate. *E.g., First National Bank* v. *Cities Service Co.,* 391 U.S. 253, 284-289 (1968). It is hard to imagine a case with less merit than this one—as noted, the Agins could not even allege that the new zoning had any greater impact than the old, and the ordinance on its face allowed up to five residential units. Under these circumstances, the California Court was plainly correct in its holding. Indeed, with the factual context understood, Amici submit that this case does not raise a substantial federal question.

2. *There is no damage remedy available in this case.* In view of its holding on the "taking" claim, the discussion of the California Supreme Court regarding damages, although well reasoned and Amici believe correct, may be characterized as dicta. Since it is plain that the Agins have failed to state a claim of a "taking" and accordingly no relief is appropriate, there is no need to consider the issue. However, in the event that the Court does reach this issue, Amici submit that the decision of the California Supreme Court should be affirmed, for a number of important reasons.

First, there is no precedent for an "inverse condemnation" remedy in the context of an overly burdensome regulatory scheme.

(a) In no case has this Court ever upheld an award of damages on the theory of "inverse condemnation." Instead, the uniform result has been to tell the agency involved it could not proceed unless it paid compensation. *E.g., Kaiser Aetna* v. *United States,* 100 S. Ct. 383 (1979) (regulation found to be "taking" and enforcement of Corps of Engineers order denied); *Penn-*

sylvania Coal Co. v. *Mahon,* 260 U.S. 393 (1922) (regulation found unconstitutional and enforcement enjoined). The supposedly contrary cases cited by the Appellants uniformly hold that where the United States intends to carry out a program and the Tucker Act is available for a damage remedy an injunction will not issue. These cases thus support the judicial deference argument made below, but surely do not suggest that damage remedies are appropriate against the legislative will.

(b) Virtually all the other states which have specifically considered this issue have concluded, as has California, that in circumstances similar to those here no "inverse condemnation" damage remedy is available for an unconstitutionally burdensome regulation. Thus, far from being an aberration as Appellants imply, the *Agins* decision is fully consistent with the position of the highest courts in most states. *See, e.g., Eck* v. *City of Bismark,* 283 N.W.2d 193, 200 (N.D. 1979); *Holaway* v. *City of Pipestone,* 269 N.W.2d 28 (Minn. 1978); *Fred F. French Investment Co.* v. *City of New York,* 39 N.Y.2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381, *appeal dismissed,* 429 U.S. 990 (1976).

(c) *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388 (1971), and *Davis* v. *Passman,* 99 S. Ct. 2264 (1979), do not support a constitutional damage remedy here. Those cases indicate that a constitutional damage remedy may be implied where injunctive relief would be futile and no statutory remedies exist. In the present case, however, injunctive relief is entirely adequate. Since the gist of the complaint is failure to allow development, an order striking down an ordinance and requiring that a project proceed will fully vindi-

cate the Agins' rights. California courts have not hesitated to issue such orders in appropirate cases. *E.g., Furey* v. *City of Sacramento,* 24 Cal. 3d 862, 157 Cal. Rptr. 684, 598 P.2d 844 (1979), *cert. denied,* 100 S. Ct. 476 (1979).[26]

Second, a constitutional damage remedy would cause wholesale disruption of government resources and greatly inhibit legitimate regulation particularly, but not exclusively, in the land use area.

(a) The remedy Appellants seek would likely cause staggering financial dislocation to already overburdened government units in instances when they have not knowingly committed resources. For example, in *Horizon Adirondack Corp.* v. *State of New York,* 88 Misc.2d 619, 388 N.Y.S.2d 235 (1976), the court rejected an "inverse condemnation" claim in part because of the tremendous financial impact—over $500 million in total—which could have resulted from such a decision. Moreover, the same problems would extend well beyond the land use area. Thus, under the rule sought by Appellants, had *Andrus* v. *Allard, supra,* come out the other way presumably Congress would have purchased all the Indian artifacts in the United States containing bird feathers, surely not what Congress had in mind when it passed the Migratory Bird Treaty Act.

(b) The effect of a mandatory damage remedy will be to discourage legitimate regulation, particularly since determining in advance whether a particular regulatory scheme will be held overburdensome as

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[26] Moreover, in light of this Court's decision in *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency,* 99 S. Ct. 1171 (1979), a remedy under 42 U.S.C. § 1983 may also be available.

applied is often impossible. The Court's decisions have noted the importance of avoiding this type of impact on the other branches of government. *Compare Scheuer* v. *Rhodes*, 416 U.S. 232, 241 (1974); *Butz* v. *Economou*, 438 U.S. 478, 503, 506 (1978).

Finally, implying a damages remedy would significantly interfere with the relationship between the federal courts and the legislative branch, especially at the state and local level. *See National League of Cities* v. *Usery*, 426 U.S. 833 (1976). This Court has repeatedly held that the state's legislative declaration of the public interest is "well nigh" conclusive because state and local governmental legislative bodies are far better situated to determine the "necessity, character and degree of regulation," if any, which is appropriate in a particular circumstance. *Berman* v. *Parker*, 348 U.S. 26, 32 (1954); *Gorieb* v. *Fox*, 274 U.S. 603, 608 (1927). For that reason, this Court has deferred to the legislature on the provision of remedies, particularly where they involve major financial commitments. *Compare Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 396 (1971); *Dugan* v. *Rank*, 372 U.S. 609 (1963).

In the present case, Appellants seek nothing less than a court declaration that the City of Tiburon has purhased their property despite the fact that it had no intent to do so and, indeed, that the California enabling legislation under which it acted specifically precludes the City from using its zoning power to burden property unconstitutionally.

For all these reasons, the decision of the California Supreme Court should be affirmed.

ARGUMENT

I. THERE HAS BEEN NO UNCONSTITUTIONAL BURDENING OF PROPERTY IN THIS CASE

Appellants' basic claim is that since the burdensomeness of regulations is largely a factual matter, they were entitled to a trial on the merits. (Br. at 13-15.) Of course, determining whether a regulatory plan is unreasonably burdensome is often a factual question. *See Penn Central Transportation Co.* v. *City of New York, supra*, 438 U.S. at 124. But this is true in any number of areas of the law where factual questions typically predominate. *E.g., Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962) (antitrust claims). However, it has never been thought that because factual questions are important, motions to dismiss, for summary judgment, or the equivalent cannot be granted in appropriate cases. On the contrary, it has uniformly been held that such motions are appropriate where the circumstances of a particular case warrant. *E.g., First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 284-89 (1968).

The problem with the argument advanced by the Appellants and the Amici who support them is that they misunderstand the posture of the case before this Court. Appellants and their supporters insist that the question here is whether a land use regulation which destroys all value and precludes any use of property is unconstitutional.[27] But while Appellants made con-

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[27] The California Court of Appeal specifically held—and the Agins did not claim otherwise in the California Supreme Court—that the Tiburon zoning served permissible police power objectives. *Agins* v. *City of Tiburon, supra*, 145 Cal. Rptr. at 477-78.

clusory allegations to this effect,[28] the California courts held, pursuant to standard California practice as described above, that those general allegations would not be credited where the statute attacked on its face shows otherwise. Instead, the California courts held that the creditable allegations, in light of judicially-noticed matters, were that the City of Tiburon enacted a zoning ordinance which would permit plaintiffs to build between one and five residential units on their property, the exact number of residential units depending upon satisfaction of other regulations with which the Agins had not attempted to comply. (App. A at 13.) (Again, the previous zoning, which is equally subject to judicial notice, had already limited the Agins to a maximum of five residential units.) The California Supreme Court held that, on the allegations as credited for demurrer purposes, the Agins did not state facts which, if true, would entitle them to a finding that the ordinance was unconstitutional as applied.

There can be no doubt that the California court's holding that there was no unconstitutional burden was correct.

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[28] *See* Complaint paragraphs IV, IX (J.A. 5, 7). These allegations—which, as discussed below, the California courts found were transparently inaccurate—were apparently included by Appellants' counsel in an attempt to overcome pleading problems under the California state decisions which had previously held that a claim for an "inverse condemnation" did not exist where diminution in value was alleged but might exist where prohibition of all use was claimed. *Compare HFH, Ltd.* v. *Superior Court of Los Angeles County,* 15 Cal.3d 508, 518, 125 Cal. Rptr. 365, 372, 542 P.2d 237, 241 (1975), *cert. denied,* 425 U.S. 904 (1976), with *Eldridge* v. *City of Palo Alto,* 57 Cal. App. 3d 613, 621, 129 Cal. Rptr. 575, 579 (1976).

A. The California Supreme Court Applied the Correct Standard

The rule has developed in this Court and elsewhere that a regulatory scheme pursuant to permissible police power objectives does not amount to a "taking"[29] unless the owner is left with no reasonable use of his property. *Andrus* v. *Allard,* 100 S. Ct. 318 (1979); *Hadacheck* v. *Sebastian,* 239 U.S. 394 (1915); *Hudson County Water Co.* v. *McCarter,* 209 U.S. 349, 355 (1908) (Holmes, J.); *Maher* v. *City of New Orleans,* 516 F.2d 1051, 1066 (5th Cir. 1975), *cert. denied,* 426 U.S. 905 (1976); *C. F. Lytle Co.* v. *Clark,* 491 F.2d 834, 838 (10th Cir. 1974); *Steel Hill Development, Inc.* v. *Town of Sanbornton,* 469 F.2d 956, 963 (1st Cir. 1972). *See also City of Eastlake* v. *Forest City Enterprises, Inc.,* 426 U.S. 668, 674 n.8 (1976) (no "taking" unless property is "render[ed] valueless").

Thus, in *Village of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365, 384 (1926), this Court sustained, as a reasonable exercise of the police power not requiring compensation, a zoning ordinance which reduced plaintiff's property value by 75%. And in *Hadacheck* v. *Sebastian, supra,* 239 U.S. at 405, this Court approved a limitation, without compensation, which reduced the value of the property over 90%. "The cases are legion

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[29] As the New York Court of Appeals correctly explained:

"True, many cases have equated an invalid exercise of the zoning power, perhaps only metaphorically, with a 'taking' or 'confiscation' of property, terminology appropriate to the eminent domain power and the concomitant right to compensation when it is exercised. . . .

"The metaphor should not be confused with reality. Close examination of the cases reveals that in none of them, anymore than in the *Pennsylvania Coal* case . . . , was there an actual 'taking' under the eminent domain power, despite use of the terms 'taking' or 'confiscatory.' " *Fred F. French Investment Co.* v. *City of New York, supra,* 39 N.Y.2d at 593-94, 385 N.Y.S.2d at 388-89, 350 N.E.2d at 384-85.

that sustained zoning against claims of serious economic damage." *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 78 (1976) (Powell, J., concurring).

More recently, this Court in *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962), cited the *Hadacheck* case with approval in upholding an ordinance which precluded a quarry owner from continuing his business. The Court noted that:

> "Concededly the ordinance completely prohibits a beneficial use to which the property has previously been devoted. However, such characterization does not tell us whether or not the ordinance is unconstitutional. It is an oft-repeated truism that every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional." 369 U.S. at 592.

The principle cited here applies to cases of regulatory mechanisms which do not involve a physical invasion of property. While it may be that a "taking" can occur without "the transfer of physical control," *see Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104, 123 n.25 (1978), this Court has recently noted that "an actual physical invasion" is different for constitutional purposes from a regulatory "devaluation" of property. *Kaiser Aetna* v. *United States*, 100 S. Ct. 383, 393 (1979); *see also Andrus* v. *Allard*, 100 S.Ct. 318, 327 (1979); *Penn Central Transportation Co., supra*, 438 U.S. at 124.[30]

[30] As the First Circuit concluded in *South Terminal Corp.* v. *Environmental Protection Agency*, 504 F.2d 646 (1st Cir. 1974):

> "Three situations must be distinguished. First, a particular use of a parcel of property may be regulated or forbidden. Second, all uses of a parcel may be forbidden. Third, a right to use or burden property in a particular and permitted way may be transferred from the original owner to another person, or to a governmental body. Only the second and third situations are thought of as takings today." 504 F.2d at 679.

Appellants contend that distinctions between physical seizures or occupations of land and so-called "takings" by overregulation are "outmoded" and "anachronistic." They suggest that there are no analytical differences between the effect of a physical occupation of property by the government and regulation. (Br. at 21 n.8.) The law is quite the contrary, and with good reason:

> "The [police] power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain. . . ." *Mugler* v. *Kansas*, 123 U.S. 623, 669 (1887), quoted with approval in *Goldblatt* v. *Town of Hempstead*, *supra*, 369 U.S. at 593.

There are no similar policy considerations where government appropriates property for its own use. As a result, it has long been accepted, for example, that government occupation of even a small portion of a parcel of real property is a compensable "taking," but a regulation which may have a similar effect does not require compensation. *Compare, e.g., United States* v. *Clarke*, 48 U.S.L.W. 4258 (March 18, 1980) (construction of road over small portion of property is a "taking") with *Gorieb* v. *Fox*, 274 U.S. 603 (1927) (zoning regulation requiring a setback and thus precluding use

of a portion of property does not require compensation).

Since the present case involves claims of a "taking" by regulation, the California Supreme Court's application of the no reasonable use standard (App. A. at 13) was entirely correct.[31]

B. The Agins' Creditable Allegations, If True, Would Not Constitute a Taking

The Tiburon ordinance in question does not even come close to the limitations sustained in the foregoing cases. Thus, the California Supreme Court's conclusion that under the foregoing precedents the Agins' creditable allegations if proven would not constitute a "taking" (App. A. at 13-14) was plainly correct. A brief analysis of the factors considered in *Penn Central* emphasizes this point:

(a) *Economic impact on the owner.*[32] In this case, there is no established economic impact on the owner or even upon the owner's reasonable investment-backed expectations.[33] The zoning at the time the Agins purchased the property allowed a maximum of five residential units. City of Tiburon, Ordinance No. 9 N.S., Section 10-3. Of course, the Agins had no vested right to build even that number of units.[34] Indeed, we

[31] The California courts have generally applied this standard in regulatory "taking" cases. *See Pan Pacific Properties, Inc.* v. *County of Santa Cruz, supra; Gisler* v. *County of Madera,* 38 Cal. App. 3d 303, 112 Cal. Rptr. 919 (1974).

[32] *See* 438 U.S. at 124.

[33] As this Court has noted, expectations of future profits are in any case entitled to minimal weight. *Andrus* v. *Allard, supra,* 100 S. Ct. at 327.

[34] *See, e.g., Fleming* v. *Rhodes,* 331 U.S. 100 (1947).

do not understand the Appellants to contend that the Agins' purchase of their property somehow precluded the city from a reasonable rezoning in the public interest. And in any case the Agins' reasonable expectations could not have been that they would ultimately build or sell the property for more than five residential units.[35]

[35] Appellants do not contend that they had any reasonable expectation of being able to use the property for anything other than residential construction or to build more than the five residential units which the zoning allowed when they purchased the property. The long-standing rule in zoning cases, at least, is that where an owner purchases a piece of property with actual or constructive knowledge of particular restrictions, he is generally not in a position to attack those restrictions.

The reason for this result is plain. Where an owner purchases a piece of property knowing that it is subject to restrictions, the price he pays reflects them and allowing the owner to circumvent those restrictions would simply give him a windfall:

> "[T]hey bought land which [they] knew might be subject to restrictions and the price [they] paid should have been discounted by the possibility that restrictions would be imposed. Since [they] got exactly what [they] meant to buy, it can perhaps be said that society has effected no redistribution [*i.e.*, reduction in value] so far as [they are] concerned. . . ." *HFH, Ltd.* v. *Superior Court of Los Angeles County,* 15 Cal. 3d 508, 125 Cal. Rptr. 365, 542 P.2d 237, 246 (1975), *quoting from* F. Michelman, *Property Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law,* 80 Harv. L. Rev. 1165, 1238 (1967).

Thus, the courts have repeatedly held that "a land owner cannot create his own hardship [*e.g.*, by purchasing a property with zoning restrictions] and then require that zoning regulations be changed to meet the hardship . . . because [his] own voluntary acts caused the hardship." *C. F. Lytle Co.* v. *Clark, supra,* 491 F.2d at 838.

This result makes eminent sense. For example, assume that an owner's property is worth a certain amount with its present residential zoning but would be worth twice as much with commercial zoning. Assume further that the owner sells to a buyer who pays the seller the value of the property for commercial use. If the buyer is denied commercial zoning, is there a "taking"? Of course

The rezoning of which the Agins now complain also allows a maximum of five units. (App. D at 30-33.) To be sure, the rezoning does not absolutely entitle the Agins to five units, but specifies a range of one to five units, depending upon other considerations. The Agins, however, never applied for any permit or even specifically alleged that the effect of the remaining requirements would be to preclude five units.

There is, therefore, nothing in the record or in the California Supreme Court decision to suggest that there has been any adverse economic impact on the Agins. Contrary to the Appellants' claims in this Court, the land remains zoned for residential use and the only outstanding question is how many residences may be built.

(b) *A state tribunal's reasonable conclusion that police power objectives of health, safety, morals or general welfare would be promoted by the contemplated regulation.*[36] There can be no doubt on this point. The Tiburon zoning ordinance limits the use of the Agins' property to the construction of residences. It is beyond dispute that a residential zoning ordinance is a reasonable police power objective. *E.g., Village of Euclid* v. *Ambler Realty Co., supra.* It is equally beyond dispute that one acre, five acre, and similar zoning has been uniformly upheld throughout the country. See

not, because the buyer purchased with notice and thus the result is of his own making. *See C. F. Lytle Co.* v. *Clark, supra; HFH, Ltd.* v. *Superior Court of Los Angeles County, supra.* Indeed, the result could hardly be otherwise or else any land use restriction would be inapplicable to anyone who overpaid or who acquired a property with the expectation of doing something not permitted by the regulations in place at the time of the purchase.

[36] *See* 438 U.S. at 125.

the discussion in 2 Williams, American Land Planning Law, Chapters 38-39 (1974)."[37]

(c) *Character of the governmental action.*[38] In their brief at pages 26-27, the Appellants characterize the action of the City of Tiburon as an "acquisition of a public resource." By this they seek to bring themselves into line with cases such as *Kaiser Aetna* v. *United States, supra,* and *United States* v. *Causby,* 328 U.S. 256 (1946), where the government was physically invading the private property involved. In *Kaiser Aetna,* the government attempted to require the property owner to allow public access to its private pond; in *Causby,* the United States had forcibly acquired an easement over Causby's property by flying its aircraft at low levels.

No such thing has taken place in the present case. The City of Tiburon has not turned the Agins' property into a park; it has not required public access; it has not precluded the Agins from building on the property. It has passed what is neither more nor less than a garden-variety zoning regulation of the sort which has been sustained in thousands of cases in this country, a zoning regulation under which the Agins are permitted to build between one and five residences on their property.[39]

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[37] As noted previously, the California Court of Appeals specifically held—and the Agins did not claim otherwise in the California Supreme Court—that the Tiburon zoning served permissible police power objectives. *Agins* v. *City of Tiburon, supra,* 145 Cal. Rptr. at 478 n.3.

[38] *See* 438 U.S.at 124, 128.

[39] The case of *Benenson* v. *United States,* 548 F.2d 939 (Ct. Cl. 1977), upon which the Appellants rely (Br. at 29) is typical of

The facts of the Agins' case are simple and present as dramatic a case of overreaching by a land owner as has been litigated. The Agins bought the property involved in this litigation in 1968 for $50,000. At the time of purchase, and for some time previously, the property was zoned to allow a maximum of five single family residential units. After the State of California enacted legislation requiring cities to adopt open space zoning, the City of Tiburon reexamined its land use regulations and modified the zoning to provide for a maximum of five and a minimum of one residential unit on the Agins' and other similarly situated property. The precise number of units to be allowed is conditioned upon a variety of other factors and is to be determined by the City Planning Commission and City Council upon the owner's request based upon the factors set forth in the Ordinance. The Agins never bothered to request permits to construct any residences

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the Appellants' misunderstanding of this fundamental point. In that case, the Court of Claims found that regulations imposed by the Pennsylvania Avenue Development Corporation ("PADC") Act were so burdensome as applied to the Willard Hotel in Washington that they constituted a "taking" and awarded damages under the Tucker Act. The PADC Act authorized and required the PADC to condemn properties for restoration and the PADC plan specifically pinpointed the Willard Hotel as one of the buildings to be acquired. Indeed, before the *Benenson* case was filed, the Federal District Court in litigation over the same building had already concluded that Congress had determined to acquire the Willard Hotel and that as a result injunctive relief would not be available to the property owners. *See Don't Tear It Down, Inc.* v. *Washington*, 399 F. Supp. 153 (D.D.C. 1975). Thus, the *Benenson* case was one of that limited class of cases in which the courts, including the California courts, have held that inverse condemnation is available for precondemnation activities which serve solely to depress the price at which the government intends to purchase the property involved. *See* n.44, *infra*. In this case, Tiburon is not attempting to purchase or condemn the Agins' property.

on their property, not before the zoning change and not after.

Instead, the Agins filed a lawsuit carefully failing to claim any change in the permissible use of their property but alleging that the open space zoning had deprived their property of "any purpose or use whatsoever" and that they had been damaged in the amount of $2 million, forty times the amount they paid seven years earlier. The California Supreme Court refused to credit this allegation after taking judicial notice of the ordinance and, as a result, sustained the demurrer to Appellants' complaint. As described above, based on this Court's precedents a reduction from five to one, two, three, or four permitted residential units would plainly not be a "taking." But in this case there has not necessarily been *any* reduction in the number of units which may be built on the Agins' property. The California courts' dismissal of the Agins' "taking" claim was correct. Indeed, Amici believe that now that the procedural posture of the case is clear, it is evident that the Agins raise no colorable "taking" claim and it would be appropriate to dismiss this case for want of a substantial federal question.

II. THERE IS NO DAMAGE REMEDY AVAILABLE IN THIS CASE

For the reasons discussed previously, Amici believe that there was no "taking" in the present case so that this Court need not reach the "inverse condemnation" issue. However, Amici also believe that the California Supreme Court's decision generally precluding damages as a remedy where a regulatory scheme has unduly burdened the property is correct.

As described below, there is no precedent whatever in this Court for a holding that such a remedy is constitutionally required. The California Supreme Court's decision is consistent with the decisions of most other state courts in denying a damage remedy. Furthermore, such a remedy is unnecessary, would literally threaten to bankrupt government at all levels, and would significantly hamper the effective working of the legislative branch of government. Moreover, creation of a mandatory damage remedy under which courts would effectively tell the other branches of government that they have purchased property they thought they were only regulating is contrary to separation of powers policies announced in this Court's decisions.

A. The Precedents Do Not Support an "Inverse Condemnation" Remedy

1. *There is no precedent and no foundation in this Court's precedents for such a holding.* This Court has considered the constitutionality of regulatory schemes in a number of cases in which the owner of real or personal property has contended that the regulation on its face or as applied was so onerous as to constitute a "taking." Perhaps the most famous of these cases is *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922), in which Justice Holmes in striking down a statute as an unreasonable interference with property made his famous observation that:

> "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. at 415.

Appellants and their Amici claim these cases support an "inverse condemnation" remedy. They conclude that the use of the term "taking" is a recognition that an overly burdensome regulation is equivalent to an exercise of the eminent domain power for which the state simply omitted to provide compensation. Applicants argue that the courts should simply remedy this defect and enforce the regulation as an exercise of eminent domain. (Br. at 15-21.)

This argument is little more than a play on words. As has been regularly recognized,[40] the use of the term "taking" in this Court's decisions, *Pennsylvania Coal* included, is simply a shorthand for an impermissible use of the police power, not a reference to the eminent domain power. *See Fred F. French Investment Co.* v. *City of New York, supra*; 1 Nichols, Eminent Domain § 1.42(1) at 1-116, 1-121 (3d ed. 1978).

Indeed, in no case has this Court ever held that, where legislation intended only to regulate unconstitutionally overburdened property, the governmental agency involved must proceed with its regulatory plans and pay compensation. Instead, the uniform result has been to tell the agency involved that it could not proceed in the absence of compensation. Thus, the governmental unit has been required to abandon its regulatory scheme and to institute eminent domain proceedings if it chose to do so. This Court's most recent decision on this issue, *Kaiser Aetna, supra,* is highly instructive on this point.

In that case, the Army Corps of Engineers claimed that because Kaiser Aetna had dredged a channel from

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[40] See the discussion at n.29, *supra.*

its private pond to the ocean, the pond had become a part of the navigable waters of the United States and, as a result, Kaiser Aetna could no longer preclude public access to the pond. This Court held that "the government's attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking under the logic of *Pennsylvania Coal Co.* v. *Mahon.*" 100 S. Ct. at 392. Having so concluded, it is noteworthy that this Court did *not* order the Corps of Engineers to make payment to Kaiser Aetna. Quite the contrary, the Court held that the government could not require public access to the pond without first bringing a separate proceeding in eminent domain and paying just compensation. 100 S. Ct. at 393.[41]

Appellants claim to have found several decisions in which this Court has "opted . . . for inverse condemnation damages as the proper remedy of owners of taken property." (Br. at 35.) In fact, the cases cited

[41] In the portion of their brief in which the Appellants argue that this Court's decisions support their "inverse condemnation" claims (Br. at 31-36), Appellants seek to distinguish a number of other cases from the present situation by pointing out that in those cases damages were not sought. The cited cases are *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590 (1962); *Nectow* v. *Cambridge,* 277 U.S. 183 (1928); *Gorieb* v. *Fox,* 274 U.S. 603 (1927); *Zahn* v. *Board of Public Works,* 274 U.S. 325 (1927); *Village of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926); *Hadacheck* v. *Sebastian,* 239 U.S. 394 (1915); *Welch* v. *Swasey,* 214 U.S. 91 (1909); and *Mugler* v. *Kansas,* 123 U.S. 623 (1887). While the fact that in these cases the parties had not specifically sought damages is relevant—just as it is relevant that in none of these cases did this Court imply even in passing that damages could be sought for "inverse condemnation"—these cases are surely no support for the proposition that damage awards are appropriate.

by Appellants stand for no such proposition. They are cases in which this Court held that where the United States intends to carry out a congressional program and to pay any required compensation, the Tucker Act authorizes the payment and injunctive relief is therefore not appropriate. Indeed, it is noteworthy that in each of these cases the United States argued in the Supreme Court that it was determined to carry out the plan involved and that it would pay compensation rather than have the scheme set aside. Thus, these cases actually stand for the proposition discussed below that the courts must accord to the legislative branch the right to determine whether to proceed with the plan involved and pay compensation or drop the scheme.[42]

The necessary conclusion is that a court may properly strike down a regulation which would be an in-

[42] The cases cited by Appellants are *Hurley* v. *Kincaid,* 285 U.S. 95 (1932) (Mississippi River Flood Control Act, 45 Stat. 534, which provided for construction of levees and floodways, could not be enjoined pending compensation due, if any, since the Act authorized condemnation of flowage right over Kincaid's lands; sole remedy is the Tucker Act, 28 U.S.C. § 1491); *Dugan* v. *Rank,* 372 U.S. 609 (1963), *Fresno* v. *California,* 372 U.S. 627 (1963), and *United States* v. *Gerlach Live Stock Co.,* 339 U.S. 725 (1950) (all involving the California Central Valley Project initially established by the Emergency Relief Appropriation Act of 1935, 49 Stat. 115, in which Congress specifically provided for the purchase of water rights and authorized millions of dollars for such purchase by way of appropriation; not surprisingly, the Court concluded that the Tucker Act and the Reclamation Act, 43 U.S.C. §§ 371 *et seq.*, authorized the award of compensation for any "taking" and injunctive relief would be inappropriate); *Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974) (where Congress intended to reorganize the Northeastern railroads under the Rail Act, 45 U.S.C. §§ 701 *et seq.*, the Tucker Act provides a just compensation remedy for any "taking" of property and the reorganization cannot be enjoined).

valid exercise of the police power because of its undue burden, but it may not transmogrify a police power regulation into an exercise of eminent domain when the legislative branch never intended to pay compensation.

2. *Most state courts have reached the same conclusion as the California courts.* The Appellants and their supporters attempt to portray the California Supreme Court decision in the present case as a sport, out of touch with the decisions in state courts elsewhere in the country. In fact, however, by far the majority of state courts have taken the same view as California.[43]

Among the recent state court holdings disallowing "inverse condemnation" as a general rule and holding that injunctive or declaratory orders of one type or another were the only appropriate relief in a case where a zoning or land use restriction was claimed to be unconstitutional on its face or as applied are the following:

Eck v. *City of Bismark,* 283 N.W.2d 193, 200 (N.D. 1979) (a zoning ordinance limiting plaintiff's land to agricultural uses precluded a planned residential development; the court held that "absent a land-use reg-

[43] While for the reasons set forth in this brief Amici believe the California courts are correct, there is support for the proposition that a uniform remedy is not required:

> "Remedies X and Y may each satisfy the minimum requirements of the Constitution in the degree to which they implement a Constitutional right. If so, the Constitution permits a choice." A. Hill, *Constitutional Remedies,* 69 Col. L. Rev. 1109, 1118 (1969).

See also, A. Hill, *The Bill of Rights and the Supervisory Power,* 69 Col. L. Rev. 181, 182-93 (1969); *cf. Baker* v. *Carr,* 369 U.S. 186, 236-37 (1962).

ulation exceedingly onerous on its face, actual physical conduct inconsistent with the property rights of the landowner, or governmental precondemnation regulatory activity designed to facilitate subsequent eminent-domain proceedings, an action for 'inverse condemnation' is inappropriate to challenge the validity of a zoning ordinance"); "

Gary D. Reihart, Inc. v. *Township of Carroll,* 409 A.2d 1167 (Pa. 1979) (where property owner seeks to establish land use restrictions as unreasonable, injunctive and declaratory relief are available; there is no damage remedy for the supposed "taking");

Holaway v. *City of Pipestone,* 269 N.W.2d 28, 30-31 (Minn. 1978) (a downzoning case in which the court concluded that "a writ ordering the initiation of condemnation proceedings is an inappropriate remedy to grant to a plaintiff who succeeds in establishing that a zoning ordinance has strayed beyond mere regulation. Instead, we think such an ordinance should be declared invalid and its enforcement enjoined");

Davis v. *Pima County,* 121 Ariz. 343, 590 P.2d 459, 460 (Ariz. App. 1978) (County refused to rezone property from rural to residential and the plaintiff sought both declaratory relief and damages; the court held that the "sole remedy" for an overburdensome zoning regulation was "the undoing of the wrongful legislation and not money damages");

" California also recognizes "inverse condemnation" awards for physical "takings" and attempts to depress the market price for future condemnation. *Klopping* v. *City of Whittier,* 8 Cal. 3d 39, 104 Cal. Rptr. 1, 500 P.2d 1345 (1972), cited with approval in the court below (App. A at 14); *Pan Pacific Properties, Inc.* v. *County of Santa Cruz,* 81 Cal. App.3d 244, 254, 146 Cal. Rptr. 428, 434-35 (1978).

Fred F. French Investment Co. v. *City of New York, supra* (ordinance severely restricted use of Manhattan property; the court held the regulation invalid and struck it down but specifically refused to allow a damages remedy);

Gold Run, Ltd. v. *Board of County Commissioners,* 554 P.2d 317, 318-19 (Colo. App. 1976) (County refused to rezone mountain property from agricultural to residential and the court held that declaratory relief or certiorari review were the only remedies);

Mailman Development Corp. v. *City of Hollywood,* 286 So.2d 614, 615 (Fla. App. 1973), *cert. denied,* 419 U.S. 844 (1974) (City downzoned property to reduce the number of residential units by nearly 60 percent; court held that inverse condemnation was not allowed as a remedy even if the zoning ordinance were invalid); and

Visidor Corporation v. *Borough of Cliffside Park,* 48 N.J. 214, 225 A.2d 105 (1966), *cert. denied,* 386 U.S. 972 (1967) (city regulation limiting access to tavern can be attacked in injunctive suit but damages are not available).

3. *Bivens does not suggest the appropriateness of an "inverse condemnation" remedy.* In *Bivens* v. *Six Unknown Named Agents, supra,* this Court implied a damage remedy under the Fourth Amendment. More recently in *Davis* v. *Passman,* 99 S. Ct. 2264 (1979), the Court implied a damage remedy under the Fifth Amendment for sex discrimination. As noted previously, in *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency, supra,* 99 S. Ct. at 1776, this Court left open the question as to whether there is such a

constitutional damage remedy for an overly burdensome land use regulation.

Amici believe that *Bivens* and *Passman* furnish no support for a damage remedy in the present case. Bivens had supposedly been unlawfully arrested and his house ransacked by federal agents. Davis alleged that she was fired by ex-Congressman Passman solely on the basis of her sex. Injunctive or other prospective relief was obviously of no use to either, since the damage to Bivens had all taken place and Davis could not be reinstated because Passman was no longer a Congressman. As the Court noted:

> "[T]here are available no other alternative forms of judicial relief. For Davis, as for Bivens, 'it is damages or nothing.'" *Davis* v. *Passman, supra,* 99 S. Ct. 2277.

See also Butz v. *Economou,* 438 U.S. 478, 504-05 (1978).

In the present case the gist of the claim is that Appellants have been wrongfully precluded from constructing residences on their property. If so, injunctive relief ordering Tiburon to allow the proposed construction would be a full remedy.[45]

Although they do not specifically rely on *Bivens* or *Passman,* counsel for the Agins and the Amici who support them do claim that inverse condemnation

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[45] Amici note that in those rare instances where injunctive relief is not a full remedy—as where a physical interference has occurred or where property values have purposely been depressed for later condemnation, courts—including those in California—have generally allowed inverse condemnation remedies. *See* the discussion at page 37, *supra* and n.44. The present case does not raise the issue of whether a constitutional "inverse condemnation" remedy could be implied in such instances.

should be allowed as a remedy because, at least in California, there is no other remedy available. Their briefs portray the California courts as mindlessly permitting local governments to do whatever they choose by way of land use regulation and refusing to order injunctive relief. These arguments are erroneous both as a matter of fact and logic.

The Appellants cite a series of cases which they claim show that California courts—both state and federal [46]—have upheld against invalidation regulations which Appellants and their supporting Amici insist are outrageously burdensome. (Br. at 44-51.) Indeed, Appellants claim that no land use regulation has been invalidated by the state courts in the past twenty years. (Br. at 53.) But the heart of the matter is that in the various cases Appellants cite the Cali-

[46] In their brief Appellants inconsistently argue both that the federal courts in California are as unsympathetic to their claims as the state courts, if not worse (*e.g.*, Br. at 44-45) and that the *Agins decision*, if upheld, will send litigants flocking to the federal courts (*e.g.*, Br. at 48).

Appellants' latter point is an attempt to trigger this Court's valid concern with burgeoning federal court case loads, but is entirely ill-considered in the present context. A decision of this Court on the merits of the "inverse condemnation" claim will of necessity be one of constitutional dimension. Obviously, a decision that the U.S. Constitution requires the California state courts to make a damge remedy available necessarily means that the Constitution requires the federal courts to make such a remedy available. Since the basic contention of Appellants and the Amici who support them—*see, e.g.*, the amicus briefs of San Diego Gas & Electric Co., Half Moon Bay Properties, Inc., and Messrs. Goldstein, Fadem, *et al.* (plaintiffs' condemnation lawyers on their own behalf)—is that the California state courts improperly refuse to find "takings," a decision upholding the "inverse condemnation" remedy is likely to lead to greater, not lesser, federal court case loads as plaintiffs pursue damage remedies in what they perceive to be the least unfriendly available forum.

fornia courts have found there was no "taking." If those cases are wrongly decided, the decisions should be reviewed and reversed. But the fact that California courts refuse to find "takings" where Appellants feel they should obviously furnishes no ground for the creation of an "inverse condemnation" remedy. If the California courts find there is no "taking," Appellants and their friends will have no relief whatever remedies are theoretically available.

Moreover, Appellants have their facts wrong. While Amici have not attempted a systematic survey of all California cases on land use regulation, Amici are aware of at least five cases within the past seven years in which the Supreme Court of California has struck down zoning and land use regulations as applied or otherwise ruled in favor of property owners in land use disputes. For example, in *Furey* v. *City of Sacramento, supra,* a case decided since *Agins,* a unanimous California Supreme Court held that the City of Sacramento's open space zoning was unconstitutional as applied and that, while inverse condemnation would not lie, the plaintiffs would be entitled to declaratory or injunctive relief, including in proper circumstances prohibition of the application of the zoning to their land. *See also Youngblood* v. *Board of Supervisors,* 22 Cal. App. 3d 644, 150 Cal. Rptr. 242, 586 P.2d 556 (1978); *City of Imperial* v. *McDougal,* 19 Cal.3d 505, 138 Cal. Rptr. 472, 564 P.2d 14 (1977); *San Diego Coast Regional Commission* v. *See the Sea, Ltd.,* 9 Cal. 3d 888, 109 Cal. Rptr. 377, 513 P.2d 129 (1973); *Selby Realty Co.* v. *City of San Buenaventura,* 10 Cal. 3d 110, 109 Cal. Rptr. 799, 514 P.2d 111 (1973).

Finally, Appellants contend that injunctive relief is not useful because if the courts strike down a regula-

tion, under *Selby* v. *City of San Buenaventura, supra,* the municipality may simply enact another regulation and start over. (Br. at 47.) However, the California courts have recognized that in appropriate instances injunctive relief includes not only striking down the regulation involved but ordering the agency to allow the proposed development. *See, e.g., Furey* v. *City of Sacramento, supra.*

Thus, the California courts have properly protected property rights with injunctive and similar relief. Indeed, Professor Norman Williams, whom the Appellants cite repeatedly in their brief, specifically compliments the California courts for their considered and careful handling of zoning and land use regulation matters:

> " . . . California decisions do not appear to involve a complete abdication of judicial review, as has sometimes been the case [in other states] . . . ; rather they represent a deeply ingrained but not wholly uncritical deference to municipal autonomy on such matters. . . . The California decisions have shown a great concern for the American home. . . ." 1 Williams, American Land Planning Law, § 6.03 at 116-17 (1974).[47]

Accordingly, there is no reason to apply a constitutional remedy. *See Davis* v. *Passman, supra,* 99 S. Ct. at 2276-78.[48]

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[47] Professor Williams goes on to compliment the California courts on their zoning decisions: "Generally speaking the calibre of legal reasoning is fairly high and some of it is absolutely first class." 1 Williams, *supra,* § 6.02 at 115.

[48] Moreover, it is worth noting that in *Bivens* and *Passman* the Court was specifically concerned about the absence of statutory remedies. In the present case, Appellants have not bothered to invoke any statutory remedy, but in light of this Court's decision in *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency, supra,* there is apparently a statutory remedy under 42 U.S.C. § 1983 for unconstitutional state and local land use regulations. (In *Monell* v. *Department of Social Services,* 436 U.S. 658 (1978), this Court reserved decision on the scope of any municipal immunity against an action for damages under Section 1983 for an alleged deprivation of constitutional rights. That question is now before the Court in *Owen* v. *City of Independence,* 589 F.2d 335 (8th Cir. 1978), *cert. granted,* 100 S. Ct. 42 (1979), and *Sala* v. *County of Suffolk,* 604 F.2d 207 (2d Cir. 1979). Amici express no view as to the merits of those cases.) In addition, there is apparently a remedy against unconstitutional federal land use regulations in the Tucker Act, 28 U.S.C. § 1491.

Furthermore, the financial considerations raised by the present case—*see* the discussion at pages 45-48, *infra*—were wholly absent in *Bivens* and *Passman.* Indeed, in *Bivens* the Court specifically noted that "fiscal policy" questions were not implicated. 403 U.S. at 396. Accordingly, these cases do not support the creation of a constitutional "inverse condemnation" remedy in the present case.

B. Adopting an "Inverse Condemnation" Remedy Would Cause Wholesale Dislocation of Public Resources and Preclude Effective Governmental Regulation

Over the past 50 years, this Court has regularly sustained zoning and land use regulations and has repeatedly recognized the validity of comprehensive land use planning. In the seminal case of *Village of Euclid* v. *Ambler Realty Co., supra,* this Court first sustained the constitutionality of zoning, observing:

> '[P]roblems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions,

are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive." 272 U.S. at 386-87.

This Court has repeatedly stressed the broad environmentally-related purposes for which the police power can be invoked without the payment of compensation. *Penn Central Transportation Co.* v. *City of New York, supra,* 438 U.S. at 129 ("enact[ment of] land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city" is permissible); *City of New Orleans* v. *Dukes,* 427 U.S. 297, 394 (1976) (validity of use of police power "to preserve the appearance and custom valued by the [New Orleans French] Quarter's residents and attractive to tourists" was "obvious"); *Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974).[49]

In light of the decisions of this Court and comparable decisions in virtually every state court in the nation, a wide variety of zoning and other land use regulations have been enacted by federal,[50] state and local authorities. Thus, every state has adopted zoning enabling legislation and almost every town in the

[49] "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." 416 U.S. at 9.

[50] Among the federal programs are National Flood Insurance Program, 42 U.S.C. §§ 4001 *et seq.*; Clean Water Act, 33 U.S.C. § 1288 (land use controls), § 1344 (wetlands controls); and Surface Mining Control & Reclamation Act, 30 U.S.C. §§ 1201 *et seq.* *See* Bosselman, Federal Land Use Regulation (1977).

United States has a zoning law of greater or lesser comprehensiveness. Anderson, American Law of Zoning, § 2.21 at 62 (2d ed. 1976); 8 McQuillen, The Law of Municipal Corporations, § 25.04 at 10 (3d ed. 1976). In addition, by 1972 many states and over 350 cities and towns had enacted non-zoning land use regulations such as flood plain control, wetland and shoreland protection regulations, and coastal zone management regulations. *See* J.A. Kusler, *Open Space Zoning: Valid Regulation or Invalid Taking,* 57 Minn. L. Rev. 1, 2 and 2 n.1 (1972). And "all 50 States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas of historic or aesthetic importance." *Penn Central Transportation Co.* v. *City of New York, supra,* 438 U.S. at 107.

The effect of a holding which now subjects every governmental agency that adopts or has adopted such regulations to the possibility of damages every time a court should find a particular regulation as applied oversteps constitutional bounds has staggering implications for governmental financial soundness and regulatory processes.

1. *An "inverse condemnation" remedy threatens financial disaster.* Virtually every commentator on the subject has noted the potential financial consequences that would arise from this Court's requiring an "inverse condemnation" remedy. While forcing the City of Tiburon in this case to pay $2 million it does not have and never intended to spend[51] for property it

[51] As the Agins allege in their Complaint (paragraphs V-VI, J.A. at 5-6), the bond issue they claim should have been used to purchase their property was for an amount of $1.25 million

never wanted to buy may not itself involve vast sums of money, the implications of such a decision are enormous. A few examples make the point quite clearly.

In *Horizon Adirondack Corp.* v. *State of New York,* 88 Misc.2d 619, 388 N.Y.S.2d 235 (1976), New York had established an Adirondack Park Agency to regulate some 3.6 million acres of private land in the Adirondack mountains. A land developer which owned 26,000 acres filed an "inverse condemnation" action seeking $35 million for its land on the theory that the Agency's regulations constituted a "taking." The New York court dismissed the case on the ground that "inverse condemnation" was not an appropriate remedy, noting that an award of damages under these circumstances would "have staggering implications upon the state budget and tax system . . . ." 88 Misc. at 630, 388 N.Y.S.2d at 244. Indeed, an "inverse condemnation" award could have ultimately resulted in an unexpected liability of some $500 million to the State of New York.

Significant as these implications are for state governments, they are far worse for local governments. For example, in *Encino Park Venture* v. *City of San Antonio,* Civ. No. SA 77 CA 174 (W.D. Tex. 1977)[52] landowners challenged a city ordinance which had been enacted to protect an aquifer. The plaintiffs sought injunctive relief and "inverse condemnation" damages of more than $750 million. An injunction was entered

for *all* purchases of property for open space in the City of Tiburon. Thus in the unlikely event that the Agins were ultimately awarded the $2 million they claim—as described above, that amount is 40 times what they paid for the property—they would have succeeded in forcing Tiburon to spend nearly three times its budget for open space.

[52] The decision is reproduced as Appendix D to this brief.

by the court but no damages allowed. The court observed that, were damages to be awarded, they would have exceeded the $750 million figure. Such a damage award would have bankrupted the City of San Antonio by requiring it to expend $750 million to purchase vast areas of property which the city had reasonably thought it was regulating.

These are but examples of the kind of financial disasters which lie ahead if the Appellants' point of view is accepted in this litigation. Moreover, the impact upon the public treasury would not be limited to land use regulations, broad as that financial liability might be, because there is no difference in legal effect between a "taking" by a land use regulation and by other kinds of regulations.

For example, in *Andrus* v. *Allard, supra,* the plaintiff brought suit to challenge the congressional regulatory scheme embodied in the Eagle Protection Act and Migratory Bird Treaty Act, 16 U.S.C. §§ 668 and 703 *et seq.*, and the regulations thereunder, which prohibited sale, trade, or barter of certain migratory birds and eagles, or parts thereof, even though the birds were lawfully acquired prior to the legislation. Plaintiffs, who were in the business of purchasing and selling Indian artifacts containing bird feathers, claimed that the effect of the statute was to "take" their property without just compensation. On the merits, this Court found that no "taking" had occurred and that the regulatory scheme was not constitutionally defective. However, had the Court found that the regulations constituted a "taking," under the rule proposed by the Appellants the United States government would have unintentionally and involuntarily purchased all Indian artifacts containing lawfully-obtained bird feathers, a

result which surely was the furthest thing from Congress' intention when it passed what it thought was a regulatory scheme.

As the Court is well aware, cities and towns throughout the country are hard pressed to raise enough revenue to keep their basic functions intact. See, *e.g.*, First National Bank of Boston, Economics Department, Urban Financial Stress: A Comparative Analysis of Sixty-Six U.S. Cities (1979); U.S. Congress, Joint Economic Committee, The Current Fiscal Condition of Cities: A Survey of 67 of the 75 Largest Cities (1977). To be sure, such financial concerns do not authorize cities and towns to short-cut constitutional limits on the use of regulatory power, but they certainly do make it clear that this is not the time for the Court to impose potentially tremendous financial liability on units of local government for past and future regulatory mechanisms where the governmental agencies involved had no intention, and no idea, of spending their funds for what they thought were regulatory plans.

2. *An "inverse condemnation" remedy will preclude effective government generally and land use regulation in particular.* This Court has recognized that "the public interest requires decisions and action to enforce laws for the protection of the public." *Scheuer* v. *Rhodes,* 416 U.S. 232, 241 (1974). For that reason, the Court has held on numerous occasions that judicial remedies must not inhibit "the vigorous exercise of official authority" and must take account of the "need to protect the decision making processes of an executive department." *E.g., Butz* v. *Economou,* 438 U.S. 478, 503, 506 (1978). A number of lower courts, considering the policies described in *Scheuer* and *Economou,* have noted that this reasoning applies to municipalities:

> "[I]t is clear that the threat of such [municipal damage] liability may inhibit public officials from 'mak[ing] decisions when they are needed or . . . act[ing] to implement decisions when they are made.'" *Sala* v. *County of Suffolk,* 604 F.2d 207, 211 (2d Cir. 1979).

While the cases quoted in the preceding paragraph all involved questions as to liability under damage actions brought pursuant to 42 U.S. § 1983,[53] the same policy considerations apply here.

Appellants insist that the appropriate response to the fear of excessive acquisition of property and its concomitant cost to state and local governments is for the state and local governmental agencies to exercise care in the regulation of private property. (Br. at 41-42.) However, since the courts themselves have regularly recognized that the line between a permissible regulation and an overregulation will frequently depend on the facts of a given situation, it is hardly reasonable to require state and local legislatures to guess in advance as to the possible factual permutations of a particular regulation.

Amici submit that the position urged by Appellants would simply cause government agencies to back away

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[53] In *Scheuer, Economou and Lake Country Estates, supra,* this Court, for the policy reasons described above found that under certain circumstances federal, regional and state officials were immune from personal liability in Section 1983 cases. As discussed in n.48, *supra,* the question of the scope of any municipal immunity under this section is presently pending before the Court in *Owen* v. *City of Independence, supra,* and *Sala* v. *County of Suffolk, supra.* Amici express no view as to the merits of those cases.

from needed, permissible regulations. Thus, as noted in Mr. Justice Rehnquist's concurring and dissenting opinion in *Butz* v. *Economou, supra*:

> "It simply defies logic and common experience to suggest that officials will not have this [*i.e.*, the availability of damages] in the back of their minds when considering what official course to pursue. It likewise strains credulity to suggest that this threat will only inhibit officials from taking action which they should not take in any event. It is the cases in which the grounds for action are doubtful, or in which the actor is timid, which will be affected. . . ." 438 U.S. at 526-27.

And the California Supreme Court itself noted several years before its *Agins* decision:

> "If a governmental entity and its responsible officials were held subject to a claim for inverse condemnation . . . the process of community planning would either grind to a halt, or deteriorate to publication of vacuous generalizations regarding the future use of land." *Selby Realty Co.* v. *City of San Buenaventura,* 10 Cal. 3d 110, 120, 109 Cal. Rptr. 799, 805, 514 P.2d 111, 117 (1973).

Moreover, thoughtful commentators have uniformly reached the same conclusion. For example:

> "Availability of a remedy under inverse condemnation would inhibit the exercise of the police power. The possibility of incurring significant, unanticipated liability in money damages as a result of invalidation of a zoning ordinance in an inverse condemnation action would have a chilling effect on governmental experimentation in land-use controls. This inhibition would most severely affect rapidly growing communities—those that most need innovative land-use control, yet are least able to risk incurring such liability." Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance,* 26 Stan. L. Rev. 1439, 1450 (1974).

See also to the same effect 5 Williams, American Land Planning Law, § 159.18 (1975) and § 158.09 (1979 Supp.);[54] L. Bozung, *Judicially Created Zoning Compensation: California's Brief Experiment with Inverse Condemnation,* 10 Environmental Law 67 (1979);[55] Note, *Eldridge* v. *City of Palo Alto: Aberration or New Direction in Land Use Law?,* 28 Hastings L.J. 1569 (1977).

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[54] Some of the Amici supporting Appellants have implied that Professor Williams, one of the country's acknowledged experts on land use planning law and policy, suggests that the *Agins* case was wrongly decided and that an "inverse condemnation" remedy should routinely be allowed. *E.g.,* Brief of National Association of Home Builders at 7. In fact, Professor Williams states that while there may occasionally be extraordinary circumstances under which an "inverse condemnation" remedy would be appropriate, "real dangers would be involved in a proposal [such as that made by Appellants here] to expand inverse condemnation to play a major role in the whole system." Indeed, Professor Williams noted that allowing "inverse condemnation" would make regulation "financially impossible" for a municipality and would, as a result, "break the whole scheme of land use controls." 5 Williams, American Land Planning Law, § 159.18 (1975). For that reason, Professor Williams specifically approved the reasoning of the California Supreme Court in *Agins*: "The court was clearly correct in its conclusion that any other conclusion would have severely inhibited needed public regulation." 5 Williams, American Land Planning Law, § 158.09 at 44 (1979 Supp.).

[55] "The specter of the courts looking over the shoulder of local government, scrutinizing its actions, has even greater implications for the process itself in the early formulation stages. Planning Commissions, made up most often of ordinary citizens already overly conscious of developer and landowner protests to much-needed growth control and environmental preservation restrictions, will be even more reluctant to enact innovative programs when an unwanted acquisition of a re-

C. Implying an "Inverse Condemnation" Remedy Would Interfere With the Relationship Between the Courts and the Legislative Branch

In our system of government, the primary responsibility for determining what measures will promote the public welfare lies with the legislative branch and the courts pay substantial deference to the legislative judgment. Thus, the Court long ago explained, referring specifically to land use restrictions, that:

> "State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character and degree of regulation which these new and perplexing conditions require and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable." *Gorieb* v. *Fox*, 274 U.S. 603, 608 (1927).

Thus, the state's legislative declaration of what the public interest requires is "well-nigh conclusive." *Berman* v. *Parker*, 348 U.S. 26, 32 (1954). *See also Village of Euclid* v. *Ambler Realty Co., supra*, 272 U.S. at 388; *Zahn* v. *Board of Public Works*, 274 U.S. 325, 328

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stricted parcel may be the ultimate result of their efforts. . . . It has been suggested that, on the contrary, cities and towns under the threat of an inverse condemnation action will in fact make better reasoned decisions, weighing the alternatives, examining cost/benefit analyses, and generally undertaking a more thorough investigation of the relevant issues. Such a hypothesis ignores the present realities of the planning process. . . . Professional planning departments are constantly pressured by developers and landowners for special treatment and are extremely susceptible to market forces. Their decisions are not made in an environment-community preservation vacuum and they are frequently reminded of the consequences and effects of their plans." L. Bozung, *supra*, 10 Environmental Law at 108-109.

(1927) ("[T]he settled rule of this court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question.") [56]

In the present case—and in all those cases like it in which federal, state, or local governments have attempted to regulate—the Appellants insist that this Court should substitute its judgment for that of the legislative branch as to whether to regulate or condemn. Of course, it is the province of this Court and the lower courts to tell legislators when their regulatory schemes have overstepped permissible bounds and unduly interfere with protected private property rights. But it has never been thought to be a proper role for a court to tell a legislature which, based on its considerations of the public welfare, has specifically decided to regulate—and not to acquire property through the use of eminent domain—that it has in fact, much to its surprise, committed resources for the purchase of the property. Such a result would be inconsistent with the cases discussed previously in which the Court has uniformly deferred to the legislative judgement as to appropriate remedy.[57]

Thus, as the Supreme Court of Pennsylvania recently pointed out in *Gary D. Reihart, Inc.* v. *Township of Carroll, supra,* in refusing to permit a damage remedy for an alleged "taking" caused by unduly restrictive land use regulations when the state legisla-

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[56] "The statement of the rule in *Zahn* remains viable today." *Moore* v. *City of East Cleveland*, 431 U.S. 494, 514 n.1 (1977) (Stevens, J., concurring).

[57] *See* the cases discussed at n.42, *supra*.

ture had provided only remedies for injunctive and declaratory relief:

> "The Municipalities Planning Code is the Legislature's mandate for the unified regulation of land use and development. The Code also sets forth procedures by which landowners and others may challenge municipal decision-making in this area. These procedures are, in the Legislature's judgment, the best means of balancing the interests of municipalities with those of land owners and others. Commentators view the Municipalities Planning Code's procedures for challenging local land regulations as a significant advance over prior methods. To permit actions for damages in disputes over local subdivision planning, as Appellant urges, would surely undermine the Legislature's established procedures for resolution of controversies involving land use and development." 409 A.2d at 1170.

The result sought by the Appellants is particularly troublesome where state and local government is concerned. For example, in *National League of Cities* v. *Usery,* 426 U.S. 833 (1976), this Court struck down a congressional attempt to control state legislative decisions regarding payment of state and local government employees because of the interference with state and local government policy decisions:

> "Quite apart from the substantial costs imposed upon the states and their political subdivisions, the Act displaces state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require." 426 U.S. at 833.

Yet, this is precisely what the Appellants would have the Court do here.

This result would be particularly unreasonable in the present case since the State of California has specifically forbidden cities such as Tiburon from exercising the state-granted open space zoning ordinance power to "take" property by overregulation. Cal. Gov. Code § 65912. Thus, the California legislature has made a judgment that the zoning ordinances it has required cities to enact shall be within the permissible scope of the police power. It would be a unique step, indeed, for this Court to tell the City of Tiburon that, because its open space zoning has overstepped the permissible bounds of regulation, it has bought the Agins' property despite the specific legislative judgment not to use the eminent demain power in this instance. *Compare United States* v. *Clarke, supra,* 48 U.S.L.W. at 4260 (Congressional decision to limit acquisition power to direct condemnation suits precludes "inverse condemnation" remedy).

* * *

For all of the reasons described in this section of the brief, Amici submit that the creation of an "inverse condemnation" remedy in the circumstances of the present case would be unprecedented, unwarranted, unwise, and contrary to longstanding policy governing the relationship between the judicial and legislative branches. The California Supreme Court was correct to reject the Agins' claims in this regard.

CONCLUSION

For the foregoing reasons, Amici believe that the holding of the California Supreme Court is correct. Indeed, the holding on the "taking" issue is so clear that Amici believe it would be appropriate for this Court to dismiss the appeal for failure to raise a substantial federal question. However, in the alternative, this Court should affirm the decision of the Supreme Court of the State of California in all respects.

Respectfully submitted,

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Washington, D.C.

March, 1980

APPENDIX

APPENDIX A

The interests of Amici are as follows:

1. The Conservation Foundation is a nonprofit research and communications organization based in Washington, D.C. The Foundation's primary purposes are to improve the quality of the environment and to promote wise use of the earth's resources. Since its founding in 1948, The Conservation Foundation has worked extensively in the fields of land use planning, urban conservation, coastal resources protection and public land management.

2. The Environmental Defense Fund ("EDF") is a private, nonprofit, national membership organization with offices in Washington, D.C., New York, Denver and Berkeley, California. It has a membership of more than 45,000 persons, including scientists, educators, lawyers and other citizens dedicated to finding scientifically-sound solutions to the nation's environmental problems. EDF and its members have a keen interest in promoting environmentally sound land use management policy at all levels of government.

3. The National Audubon Society ("NAS") is a nationwide membership organization with 439 chapters and 400,000 members. NAS owns and operates the Richardson Bay Wildlife Sanctuary and Whittell Education Center in the City of Tiburon. NAS' goals include working for policies that encourage environmentally and economically sound land and water resource planning at the national, state, and local levels and promoting environmentally sensitive development and rehabilitation in our cities.

4. The National Center for Preservation Law was incorporated in 1978 under the laws of the State of New York as a nonprofit organization devoted to architectural, historic, and neighborhood conservation. The Center maintains offices in New York, Washington and San Francisco and devotes its resources to advising and providing legal

services for interested state, local and private agencies and groups with respect to conservation of historic resources.

5. The National Conference of State Historic Preservation Officers is a nonprofit organization which facilitates the administration of State and Federal programs for the preservation of America's historic, architectural and cultural heritage. The National Conference membership consists of the officially designated State Historic Preservation Officer in each of the fifty states, the District of Columbia and five territories. Among the responsibilities of these officers are the compilation of statewide surveys of historic resources; nominations of inventoried properties to the National Register of Historic Places; and the administration of the National Historic Preservation Act grants-in-aid program.

6. The National Parks and Conservation Association is a membership organization with approximately 35,000 members and contributors nationwide. The Association's main goal is the preservation and expansion of the National Park system. It is particularly concerned with the units of this system, but the Association has found that approximately two-thirds of the National Park system's units are adversely affected by incompatible land uses and activities outside their borders. The Association has concluded that in the long run one of the most promising solutions to these problems is the application of local land use laws, especially zoning, to prevent adverse uses and activities.

7. The National Trust for Historic Preservation is the leading national organization in the field of historic preservation. It was chartered by Congress in 1949 as a "charitable, educational, and nonprofit" corporation "to facilitate public participation in the preservation of sites, buildings, and objects of national significance or interest," and to preserve and administer historical properties significant in

American history and culture for the public benefit. 16 U.S.C. § 468. The National Trust has more than 160,000 contributing members, including approximately 2,000 member organizations involved in local and regional historic preservation activities. In addition to owning and maintaining historic properties, the National Trust furthers historic preservation through extensive advisory and educational services. The Trust has worked closely with many of the more than 500 municipalities which have enacted historic preservation ordinances.

8. The National Wildlife Federation is a nationwide conservation organization dedicated to the restoration, wise use and perpetuation of natural resources. Headquartered in Washington, D.C., the Federation has over 2,500,000 members and affiliate organizations in all 50 states, as well as Guam, Puerto Rico and the Virgin Islands. The Federation's membership in California is over 121,000, including the members of its affiliate, the California Natural Resources Federation. The Federation and its members and member groups, including the California Natural Resources Federation, have a long-standing interest in ensuring that zoning regulation provides for critical area protection, rational land use planning and landmarks preservation.

9. Preservation Action is a nonprofit organization located in Washington, D.C. which actively participates in the legislative process. Preservation Action encourages the protection of historic buildings and districts, the protection of neighborhoods and the promotion of neighborhood conservation.

10. The Sierra Club is a nonprofit membership organization which has been extensively involved at both local and national levels in matters pertaining to land use. The Sierra Club, through its nearly 200,000 members, has a long-standing interest in ensuring that zoning regulation be an instrument of rational land use planning sensitive to environmental concerns.

APPENDIX B

OFFICIAL RECORDS COUNTY OF MARIN

RECORDING REQUESTED BY

30216

RECORDED AT REQUEST OF TITLE INSURANCE AND TRUST COMPANY

30216 AT 50 MIN. PAST 10 A.M.

OCT 25 1968

Official Records of Marin County, Calif.

N. J. Giacomini

FEE $ 3.00 RECORDER

Donald W. Agins, D.D.S.
Bonnie G. Agins
2232 Road 20
San Pablo, Calif. 94806

BOOK 2250 PAGE 302

SPACE ABOVE THIS LINE FOR RECORDER'S USE

AP 39-172-03 AA 0-002 7761-0/2 [illegible]

Same Asabove

Transfer Tax Paid
R. I. Giacomini
Marin County Recorder

REAL PROPERTY TRANSFER TAX $ 55.00

Title Insurance and Trust Company

BY [signature] Deputy or Agent

Joint Tenancy Grant Deed

816668 m6067

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged,

SAMUEL H. HOLT, a single man, ROBERT M. RAYMER, a single man, and ALLEN M. SINGER, a single man

hereby GRANT(S) to

DONALD W. AGINS and BONNIE G. AGINS, his wife , AS JOINT TENANTS,

the real property in the City of Tiburon, County of Marin, State of California, described as:

See description attached hereto, comprised of two pages

Dated: October 24th, 1968

STATE OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO } ss.

On October 24, 1968 before me, the undersigned, a Notary Public in and for said State, personally appeared Samuel H. Holt, Robert M. Raymer and Allen M. Singer

known to me to be the person[s] whose name[s] is/are subscribed to the within instrument and acknowledged that they executed the same.

WITNESS my hand and official seal.

[signature]

My Commission Expires January 4, 1971

Name (Typed or Printed)

[signature]
Samuel H. Holt

[signature]
Robert M. Raymer

[signature]
Allen M. Singer

NOTARY PUBLIC IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

(This area for official notarial seal)

Title Order No. 816668 Escrow or Loan No.

MAIL TAX STATEMENTS AS DIRECTED ABOVE

BOOK 2250 PAGE 302

APPENDIX C

Excerpt From City of Tiburon Ordinance No. 9 N.S., Effective September 18, 1967

Section 10-3: *"RO-1" Residential, Open Zone (one acre):*

(A) Purposes:

This zone is established in order to:

Provide for the development of single family residences in outlying areas and areas having special topographic features, and prevent a higher population density requiring a higher level of services, and damaging to the natural appearance or top-soil retention of an area;

Create conditions conducive to a desirable low density suburban environment, and protect it from the encroachment of unrelated uses affecting the continuance of such uses in existence in the area;

Provide for sufficient space to enable residents of the property to raise crops and fruit and keep small animals in a limited and controlled manner so as to be in keeping with the residential character of the area;

(B) Uses Allowed by Right:

1. One family dwelling, one guest house;

2. Providing room and board for not more than one paying guest in a single family dwelling;

(C) Land and Structure Regulations:

1. Minimum parcel area: 40,000 square feet;

2. Minimum parcel area per dwelling unit: 40,000 square feet;

3. Maximum building coverage: 15%;

4. Minimum parcel width: 70 feet;

5. Minimum yards: Front, 30 feet; Side, 20 feet; Rear, 20% of the depth of the lot or 25 feet, whichever is less;

6. Maximum building height: 30 feet; 2½ stories.

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA 77 CA 174

ENCINO PARK VENTURE, a Texas Partnership, et. al.

v.

CITY OF SAN ANTONIO, et. al.

TEMPORARY RESTRAINING ORDER

Filed June 18, 1977

Plaintiff's Original Complaint and Application for Preliminary and Permanent Injunctions or, alternatively, for Damages was presented to the Court on Friday, June 10, 1977. Plaintiff's Motion for an Order Granting a Hearing on Application for a Preliminary Injunction was presented to the Court on Monday, June 13, 1977. On that same day, this Court's Order Referring the Application for a Preliminary Injunction to the United States Magistrate was entered. The initial hearing on the preliminary injunction was conducted by the Hon. Joseph F. Leonard, Jr., United States Magistrate, on Thursday, June 16, 1977. All parties were represented at this initial hearing. The magistrate's Findings of Fact and Recommendations were submitted on June 17, 1977. By this Court's Order of June 13, 1977, all parties have been given five days following service of the magistrate's report in which to file written objections with the Court.

This is a suit seeking to enjoin enforcement of Ordinance No. 48106 enacted by the City Council of the City of San Antonio, Texas. The Ordinance aforesaid provides, in part, that no additional building permits shall be granted,

including permits for changing structures already installed; no additional zoning changes shall be granted; no further plat approvals shall be made; no additional construction or installation of sewer, water, gas or electrical service extensions or connections by city departments or city owned utilities shall be made. The ordinance covers all lands situated over the area designated by the Texas Water Quality Board as the Edwards Aquifer Recharge Zone, and also covers the drainage area of such lands, as well. The ordinance will become effective as of 12:01 A.M. on June 20, 1977.

The Court finds that the Plaintiffs, Encino Park Venture, et. al., will suffer immediate and irreparable harm, injury and damage if Defendants of the City of San Antonio, Bernardo Eureste, Rudy C. Ortiz, Joe Webb, Joe V. Alderete, Jr., Helen Dutmer, and Frank Wing, and their agents, servants, employees and attorneys and all persons in active concert and participation with them are not temporarily restrained and enjoined from: (1) Enforcing in any way Section Four of Ordinance No. 48106, concerning the construction and installation of all sewer, water, gas or electric service extensions or connections in the areas covered by said Ordinance; (2) enforcing Sections One, Two and Three of Ordinance No. 48106, whenever such enforcement would interfere with the obtaining of building permits, zoning changes, or plat approvals urgently and immediately needed under the terms of any contracts already effective as of the date on which this Order is entered.

The Court finds further that the Ordinance enacted by the Defendants in this cause has resulted in extensive adverse publicity for the Plaintiffs. The adverse publicity generated will irreparably injure the Plaintiffs' customer and business relationships, unless the enforcement of this Ordinance is restrained and enjoined pending a decision on the merits on the Applications for Preliminary and Permanent Injunctions. There has been testimony that

this Ordinance, if allowed to become effective, will jeopardize Plaintiffs' on-going loan and credit transactions, endangering their entire investments. Although a specific dollar amount is sought in the alternative to injunctive relief, the testimony already received clearly shows that damages may be much higher than the figure alleged [*] and, in any event, that they would be almost impossible to ascertain accurately. Loss of business opportunities if the Ordinance becomes effective would be difficult to reduce to legal damages, due to the variable market situation, the large number of those potentially affected by the Ordinance, the present uncertainty as to the length of the Moratorium, and so forth. Plaintiffs also will be irreparably injured if Defendants are not restrained from proceeding with the enforcement of this Ordinance, because this may be considered to change the relevant status quo, thereby impairing this Court's authority to consider their requests for injunctive relief on the merits.

It is therefore ORDERED, ADJUDGED and DECREED that Defendants the City of San Antonio, Bernardo Eureste, Rudy C. Ortiz, Joe Webb, Joe V. Alderete, Jr., Helen Dutmer, Frank Wing, and their agents, servants, em-

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* The paragraph of the complaint to which Judge Spears refers read as follows:

> "IX. Damages. The Plaintiffs herein alleged that in the event Ordinance No. 48106 is held to be otherwise constitutional by this Court, that, alternatively, the Plaintiffs allege that such Ordinance nevertheless constitutes a taking of Plaintiffs private property without just compensation in violation of the United States Constitution and Texas Constitution and that Plaintiffs herein allege that as a result of such taking, Plaintiffs have sustained damages to their property in the amount of at least Seven Hundred Fifty Million and No/100 Dollars ($750,000,000.00) and that the Court, after a determination of the class members and adequate notices to potential members thereof, if necessary, appoint a Master to determine the nature and extent of each class member's interest in real property affected by the Ordinance, and that thereafter, the Plaintiffs demand a jury trial for a determination of the damages due Plaintiffs and class members as compensation for the taking of their private property."

ployees and attorneys and all persons in active concert and participation with them are temporarily restrained and enjoined from: (1) Enforcing in any way Section Four of Ordinance No. 48106, concerning the construction and installation of all sewer, water, gas or electric service extensions or connections in the areas covered by said Ordinance; (2) enforcing Sections One, Two and Three of Ordinance No. 48106, whenever such enforcement would interfere with the obtaining of building permits, zoning changes, or plat approvals urgently and immediately needed under the terms of any contracts already effective as of the date on which this Order is entered.

This Temporary Restraining Order shall remain in force and in effect until June 28, 1977, unless further extended or earlier dissolved by further order of the Court; provided, that Plaintiffs shall give security in the amount of $50,000.00 for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. The Court finds that this security is adequate to protect the Defendants from any costs and damages which they may incur as a result of this Order; and it is further

ORDERED, that the court reporter of this Court shall transcribe the record of the initial hearing conducted by the magistrate on June 16, 1977, as expeditiously as possible, for the review by this Court as required by law. The Plaintiffs and Defendants herein each shall deposit one-half of the estimated cost of transcription, the total cost having been estimated to be Four Hundred Dollars ($400.00), with the clerk of this Court. Liability for the entire cost of transcription will be adjusted in the final order of this Court.

Signed and entered this 18th day of June, 1977, at 10 o'clock P.M.

/s/ ADRIAN A. SPEARS
Adrian A. Spears
United States District Judge

MOTION FILED
APR 10 1980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,

Appellants,

v.

CITY OF TIBURON,

Appellee.

On Appeal from the Supreme Court of California

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OUT-OF-TIME AND *AMICUS CURIAE* BRIEF OF THE STATE OF NEW JERSEY

JOHN J. DEGNAN,
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IN THE

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OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,

Appellants,

v.

CITY OF TIBURON,

Appellee.

On Appeal from the Supreme Court of California

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OUT-OF-TIME

Pursuant to Rule 42 (3) of the Rules of this Court, the State of New Jersey respectfully moves the Court for leave to file a brief *amicus curiae* out-of-time in the above entitled case on the ground that due to information conveyed to the Office of the Attorney General of the State of New Jersey, that the Brief of the Appellee, City of Tiburon, was required to be filed with the Court on April

21, 1980, this Office believed that its brief *amicus curiae* in support of Appellee's brief was not required to be filed until that date.

For the foregoing reason the State of New Jersey respectfully urges the Court to grant this motion for leave to file the accompanying brief *amicus curiae* out-of-time in support of the brief of the Appellee, City of Tiburon.

Respectfully submitted,

JOHN J. DEGNAN,
Attorney General of New Jersey,
Attorney for the State of New Jersey.

STEPHEN SKILLMAN,
Assistant Attorney General.

Dated: April 9, 1980.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,
Appellants,

v.

CITY OF TIBURON,
Appellee.

On Appeal from the Supreme Court of California

AMICUS CURIAE BRIEF OF THE STATE OF NEW JERSEY

Interest of the *Amicus*

The State of New Jersey has filed a separate *amicus curiae* brief in this matter because the resolution of issues raised here will undoubtedly affect important and wide

ranging legislative programs carefully fashioned to preserve the environment and the resources of this State. Appellants challenge a decision of the Supreme Court of California which, *inter alia,* limits the remedies available to a landowner who claims that he has been deprived of substantially all use of his propery as a result of restrictive land use legislation. The California Court has held that such persons may not seek damages in inverse condemnation but rather must seek invalidation of the restrictive legislation by way of an action for declaratory relief or administrative mandamus. If this decision is reversed by this Court, New Jersey's ability to develop innovative and flexible land use programs which address major environmental concerns will be seriously hampered. Responsible public officials will fear the financial consequences should good faith attempts to limit land use be held to "take" private property. Damage awards will act as a deterrent to important and worthwhile planning efforts designed to protect the precious resources of the State.

The magnitude of the pollution problem in New Jersey becomes more apparent each day as entire water supply systems are declared unsafe and hazardous chemicals are found indiscriminately dumped over the land. Haphazard growth and development has brought about much of the destruction. We know now that the State's resources are finite and that we must preserve whatever is not yet irretrievably lost.

The New Jersey legislature has enacted comprehensive land use statutes which promote orderly and appropriate development while insuring that those resources are not squandered. These regulatory programs form the basis for a State effort to halt the deterioration of the environment and, at the same time, create a framework for rational, planned growth.

The first such environmental land use legislation in New Jersey, N.J.S.A. 58:1-26 *et seq.,* was passed in response to long standing flood hazards exacerbated by intensive development along stream corridors throughout the State. Its purpose was "to safeguard the public against danger from the waters impounded or affected by . . . structure[s]" within the channel of any stream. N.J.S.A. 58:1-26. This statute provided some measure of flood protection by controlling development which altered the capacity of streams to carry and retain storm water.

More recently, L. 1979, ch. 359 (originally enacted as L. 1962, ch. 19 and codified at N.J.S.A. 58:16A-50 *et seq.*) established a delineation and regulatory program for flood prone areas so as to permit the State to more effectively deal with the recurring flooding problems encountered in New Jersey river basins. Pursuant to this legislative mandate the State Department of Environmental Protection (hereinafter "DEP") has promulgated regulations which establish prohibited uses and exceptions thereto, non-regulated uses and regulated uses. See N.J.A.C. 7:13-1.4, 1.5, 1.6. Structural development and alteration of ground contours and water channels are generally prohibited in the floodway, as are the storage and processing of pesticides, various types of waste and hazardous materials; low hazard uses such as agriculture and recreation are permitted or not regulated.

Presently, owners of land located in the floodway have brought suit in the Superior Court of New Jersey alleging that the above-mentioned statutory provisions and the regulations adopted thereunder have resulted in a taking of their property without compensation contrary to the N.J. Const. art. 1, para. 20 and the U.S. Const. amend. V. *Usdin and Hirsch* v. *State,* No. 6-35552-76 (Law Div. N.J., filed May 4, 1977). Additionally, plaintiffs claim that the DEP has prevented them from constructing an

industrial building upon their property and has thus unreasonably sought to preserve open space for the benefit of the public by means of the State's police power. Finally, plaintiffs request damages or an order compelling defendant to initiate condemnation proceedings.[1]

The delineation of flood hazard areas reflects a new understanding of their importance as natural flood retention basins. The importance of the State's coastal wetlands was recognized by the New Jersey legislature in 1970 by the passage of the Wetlands Act, N.J.S.A. 13:9A-1 *et seq.* This Act directs the Commissioner of the DEP to inventory and map the State's wetlands and authorizes him to adopt "orders regulating, restricting or prohibiting dredging, filling, removing, or otherwise altering, or polluting coastal wetlands." N.J.S.A. 13:9A-2. Under N.J.S.A. 13:9A-4 no person may conduct a "regulated activity"[2] on mapped wetlands without a permit; however, N.J.S.A. 13:9A-6 specifically provides that any person whose lands are affected by an order or permit may file a complaint in the Superior Court of New Jersey "to determine whether such order or permit so restricts or otherwise affects the use of his property as to deprive him of the practical use thereof." In such a case, if the

[1] In *Schroth* v. *DEP*, No. A-229-78 (App. Div. N.J. Mar. 25, 1980), plaintiffs sought and were denied similar relief because they had not demonstrated that they had been deprived of substantially all use of their property.

[2] "Regulated activity" includes "draining, dredging, excavation or removal of soil, mud, sand, gravel, aggregate of any kind or depositing or dumping therein any rubbish or similar material or discharging therein liquid wastes, either directly or otherwise, and the erection of structures, driving of pilings, or placing of obstruction, whether or not changing the tidal ebb and flow." N.J.S.A. 13:9A-4(a).

court finds that there has been an unreasonable exercise of the police power the legislature has expressly approved but one remedy—the invalidation of the order or permit as applied to the complainant's property.

In the seventeen years prior to the passage of the Wetlands Act, an average of 1,900 acres of New Jersey coastal wetlands were lost to development each year. Since the Act the DEP has permitted the development of only 375 acres through the issuance of 116 permits (as of August 31, 1977). In two cases where permits have been denied the New Jersey Courts have determined that the individual plaintiffs were not thereby deprived of the practical use of their lands. *American Dredging Company* v. *State,* 169 N.J. Super. 18, 404 A.2d 42 (App. Div. 1979), and *Carton* v. *State of New Jersey,* No. A-638-73 (App. Div. Jan. 27, 1978). Similar challenges can be expected in the future.

The wetlands actually encompass a small part of the New Jersey coastal area regulated by the DEP. The Coastal Area Facility Review Act of 1973, N.J.S.A. 13:19-1 *et seq.* (hereinafter "CAFRA"), is the State's major coastal legislation. This statute is a comprehensive legal mandate for the DEP to control and plan the development of a "unique, irreplaceable and delicately balanced" area of New Jersey known as the coastal zone. See N.J.S.A. 13:19-2; N.J.S.A. 13:19-16. In enacting CAFRA the legislature sought to protect the natural resources of this zone while promoting wise, ecologically sensitive development. N.J.S.A. 13:19-2. The DEP was given the task of weighing the need to preserve New Jersey's coastal environment against competing economic pressures through permit decisions which balance these interests according to the statutory dictates.

Thus, the CAFRA statute requires that an applicant submit a rigorous environmental analysis of a proposed

project and its impact upon the site and the surrounding region. N.J.S.A. 13:19-7. Only if it is found that the project will cause minimal impairment may a CAFRA permit issue and, even then, the DEP is given wide latitude to impose conditions upon the project if its construction would "tend to violate the purpose and intent of the act" or if it would "materially contribute to an already serious and unacceptable level of environmental degradation or resource exhaustion." N.J.S.A. 13:19-11.

Where an applicant has been denied a permit to construct a facility within the coastal area, he may challenge that denial through an administrative appeal process. In one such case, an applicant has sought approval for a housing development to be constructed, in part, along the natural waters edge where the seasonal high water table is at the surface; in another, a natural area suitable for agricultural uses because of its highly fertile soils has been proposed as a site for similar residential development. Both applicants have alleged that the DEP's refusal to allow the proposed development constitutes a taking without just compensation.

The CAFRA regulatory scheme operates within a planning framework established in N.J.S.A. 13:19-16. Pursuant to this section of the Act, the Commissioner of the DEP prepared an inventory of both the "environmental resources" and "the existing facilities and land use developments within the coastal area" as well as "an estimate of the capability of the . . . area to absorb and react to man-made stresses." Subsequently, after further consideration of "environmental values and the legitimate need for economic and residential growth" in the coastal zone, the Commissioner presented a management strategy or final environmental design to the Governor and the State legislature. This management strategy plays a central role in the DEP permit review process.

Two other major regional planning efforts based primarily on a careful balance between environmental values and economic pressures have been authorized by the New Jersey legislature. In 1969, by enacting the Hackensack Meadowlands Reclamation and Development Act, N.J.S.A. 13:17-1 *et seq.*, the legislature created the Hackensack Meadowlands Development Commission (hereinafter HMDC) to oversee the orderly reclamation and development of approximately 21,000 acres of salt water meadows in the lower Hackensack River basin. Development in the meadowlands has been complicated by uncertainty in regard to land titles as much of the land is now or was formerly flowed by the mean high tide and is thus subject to a claim of title by the State. Additionally, the land is low and flat and the geology and soils make drainage and construction difficult. Many areas in the District have been used as a dumping ground for municipal wastes and the Hackensack River has been contaminated by the discharge of large quantities of sewage and other impurities. Most importantly, a governmental body with regional land use powers and technical expertise to coordinate development while protecting the meadowlands environment was urgently needed. See N.J.S.A. 13:17-1.

The HMDC was charged with the task of formulating a Master Plan to guide development in the District. During the period when the Plan was being prepared, interim zoning measures were adopted whereby further development was permitted only on the fringes of the District for a 26 month period. This zoning was unsuccessfully challenged as a taking in *Meadowlands Regional Development Agency* v. *Hackensack Meadowlands Development Commission,* 119 N.J. Super. 572, 293 A.2d 192 (App. Div. 1972). In 1972, the HMDC adopted its final Master Plan, including codes and standards covering land use, compre-

hensive zoning, subdivisions, building construction and solid waste disposal. Large areas in the Meadowlands, generally undeveloped, were zoned for open space and recreational uses; much of this land is valuable marshland and/or adjacent to the waterways which criss cross the District. Depending upon the availability of funds and the projected costs, the HMDC plans to purchase some of this property for public use. The remainder is subject to limited use restrictions consonant with the environmental requirements of the area. Since these restrictions may well reduce the profit that can be derived from the land, they are likely to be attacked as confiscatory. Indeed, one such action has already been brought in the Superior Court of New Jersey, Law Division, by property owners who seek damages in inverse condemnation based on the park and recreation zoning classification of their property. *L.R.F.C.* v. *HMDC,* No. L-62425-78 (Law Div. N.J. Filed Aug. 16, 1979).

Most recently, the State of New Jersey has embarked on a bold and important new venture in regional land use planning. The Pinelands Protection Act, L. 1979, ch. 111 (to be codified as N.J.S.A. 13:18A-1 *et seq.*), direct a massive planning effort which may well become a model for other ecologically sensitive areas of the nation subject to intense development pressures.

The Pinelands of New Jersey contain about 1,000,000 acres of pristine pine oak forest, cedar bogs and wetlands and extensive ground and surface water resources of high quality which provide a unique habitat for a wide diversity of rare, threatened and endangered plant and animal species. See *N.J. Builders Association* v. *DEP,* 169 N.J. Super. 76 (App. Div.), certif. denied, 81 N.J. 402 (1979). The area covers 20% of New Jersey's total land mass and is the largest contiguous semi-wilderness in the

urban corridor extending from Boston to Washington, D.C.

In late 1978, Congress recognized that "there is a material interest in protecting and preserving" the unique ecology of the Pinelands for "the residents of and visitors to the area." The area was designated as a "Pinelands National Reserve," and an appropriation of $26 million in federal funds was authorized to purchase land of critical ecological value and to devise a comprehensive plan for the management of the Reserve. 16 U.S.C. §471i.

Echoing the concerns of Congress, and decrying the "current pace of random and uncoordinated development and construction" which poses "an immediate threat to the resources" of the Pinelands, the New Jersey legislature enacted the Pinelands Protection Act as a complement to the federal legislation. L. 1979, ch. 111, §2. The Act creates a 15 member Pineland Commission which is mandated to prepare, adopt and implement a comprehensive management plan for the entire area by August 8, 1980. L. 1979, ch. 111, §7. Until that date, stringent limits have been placed upon any construction or development within the Pinelands. L. 1979, ch. 111, §13.

Both the federal legislation and the State Act require the Pinelands comprehensive management plan to consider and detail a wide variety of land and water protection and management techniques, including zoning and regulation derived from State and local police powers, development and use standards, permit systems, and acquisition of conservation easements and other interests in land. 16 U.S.C. §471i(f)(3)(A); L. 1979, ch. 111, §7(d)(1). Both Congress and the State legislature have specifically directed that the management plan "include a policy for the use of State and local police power responsibilities to the *greatest extent practicable* to regulate the use of land and

water resources . . . ." 16 U.S.C. §471 i(f)(3)(B); L. 1979, ch. 111, §7(d)(2) (emphasis added). By providing for protection of acres of critical ecological importance through purchase, and protection of the rest of the vast Pinelands through regulation, both legislatures have sought to safeguard the entire area in the public interest. Although high land prices and limited funds make purchase of the entire Pinelands impossible, those lands which are most sensitive will be acquired while the remaining acreage will be subject to appropriate regulatory restraints.

The goal of the comprehensive management plan is to "preserve an extensive and contiguous area of land in its natural state" in the 500,000 central core of the Pinelands by promoting agricultural, horticultural and recreation uses and "prohibit[ing] any construction or development which is incompatible with the preservation of this unique area." L. 1979, ch. 111, §8(c). Outside the central core, the plan must "preserve and maintain the essential character of the existing pinelands environment," promote the expansion and continuation of agriculture, and "discourage piecemeal and scattered development." *Id.* §6(b). Compatible residential, commercial and industrial development is to be encouraged by the plan "in or adjacent to areas already utilized for such purposes in order to accommodate regional growth influences in an orderly way while protecting the pinelands environment from the individual and cumulative adverse impacts" of such development. *Id.*

Once the comprehensive management plan is adopted by the Pinelands Commission it in effect supersedes all other zoning laws for the area, and no construction or development will be permitted unless it conforms to the plan. *Id.*, §9(c).

The stringent limitations now in effect in the Pinelands have generated over 150 requests for administrative review. A number of applicants for development approvals have raised the taking issue and more can be expected to do so. The regulatory program developed in the Comprehensive Management Plan will most certainly engender additional challenges.

Innovative approaches to regional land use control are required if important environmental concerns are to be properly addressed. Historically, development in New Jersey and in other areas of this country has been largely unchecked except through local zoning which is necessarily centered on local needs. One result has been the destruction of natural resources that, in some instances, is irreversible. Only in this last decade has there been a State and regional effort to halt irresponsible development and preserve the environment. Only if this effort is successful will our way of life survive.

The holding of the Supreme Court of California allows government the freedom necessary to plan for the future. A reversal by this Court could impose serious financial burdens on small municipalities such as Tiburon and even greater impacts on a State and regional level. Government officials charged with planning and regulatory responsibilities for ecologically important areas would fear potential liability in those many situations where environmental interests collide with development pressures. Well conceived new programs such as New Jersey's Pinelands Protection Act would be impaired if such liability became a reality. While the invalidation of restrictive regulations would call for renewed planning efforts, damage awards would cripple State programs.

Furthermore, since limited funding is available for land acquisition, the choice to purchase must be made with care.

Lands are earmarked for acquisition pursuant to guidelines established by the legislature (see, e.g., New Jersey Green Acres Land Acquisition and Recreation Act, N.J.S.A. 13:8A-35 *et seq.*) and after the completion of a complex, often highly technical, review process. If this Court permits actions in inverse condemnation in a regulatory context, acquisition decisions will be made by a successful litigant who seeks this form of relief rather than a declaratory judgment or administrative mandamus. The State's land use planning efforts would be rendered nugatory in such circumstances.

Clearly, the State of New Jersey has a vital interest in compelling a private property owner to seek invalidation of zoning restrictions rather than a remedy in inverse condemnation.

ARGUMENT

Invalidation of regulatory restraints which deprive a landowner of substantially all use of his property affords complete and adequate relief consonant with the Fifth and Fourteenth Amendments to the United States Constitution.

It has long been a principle of law established by this Court that government may, pursuant to its police power, impose limitations on the use of real property in order to protect the public health, safety and welfare. *Andrus* v. *Allard,* 100 S.Ct. 318 (1979); *Miller* v. *Schoene,* 276 U.S. 272 (1928); *Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926); *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922); *Hadacheck* v. *Sebastian,* 239 U.S. 394 (1915); *Welsh* v. *Swasey,* 214 U.S. 91 (1909); *Mugler* v. *Kansas,* 123 U.S. 623 (1877). Under traditional due process analysis, an exercise of the regulatory authority of the State must bear a substantial relation to a legitimate governmental purpose. Moreover, the means chosen must be reasonably necessary to achieve the ends sought and not unduly oppressive upon private individuals. *Penn. Central Transp. Co.* v. *New York City,* 438 U.S. 104 (1978); *Goldblatt* v. *Hempstead,* 369 U.S. 590 (1962). In the land use context, regulation may become unduly oppressive and therefore unreasonable when limitations on use have become so restrictive as to deprive a landowner of substantially all use of his property *Nectow* v. *Cambridge,* 277 U.S. 183 (1928). As stated by Justice Holmes in *Pennsylvania Coal Co.* v. *Mahon* fifty eight years ago:

> "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. at 415.

This rule blends the due process unreasonableness test with the "taking" limitation of the Fifth Amendment to the United States Constitution. The result is a balancing of public benefits and private losses. Indeed, Justice Holmes framed the issue in terms of a continuum in which the permissible exercise of the police power gradually merges into forbidden restraints on private property:

> "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of diminution. When it reaches a certain magnitude,

> in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it is always open to interested parties to contend that the legislature has gone beyond its constitutional power. *Id.* at 413.

Pensylvania Coal Co. v. *Mahon* clearly mandates a case by case analysis in which the public purpose of the challenged legislation is weighed against the extent of deprivation imposed on private property. *Accord, Penn. Central Transp. Co.* v. *New York City,* 438 U.S. at 123-128; *see generally* W. Stoebuck, "Nontrespassory Takings in Eminent Domain" (1977); F. Bosselman, D. Callies & J. Banta, "The Taking Issue" (1973); "Development in the Law—Zoning," 91 Harv. L. Rev. 1427, 1481-1482 (1978).

The case at bar involves local "open space" zoning required by State law which limits the use of appellants' property to one family dwellings, open space uses and accessory buildings and uses. As interpreted by the California Supreme Court, the RPD-1 classification of the five aces held by Donald and Bonnie Agins permits one residence as of right and four additional residences at the discretion of the City of Tiberon depending upon the proposed design and the results of an environmental review of the plans. Appellants claim that the restrictions imposed by the City effect a taking of their land without payment of just compensation and seek both declaratory relief and damages, amounting to two million dollars, in inverse condemnation. *Agins* v. *City of Tiburon,* 24 Cal. 3d 266, 270-272, 598 P.2d 25, 26-27, 157 Cal. Rptr. 372, 373-374 (1979).

The California Court held preliminarily that "remedy by way of damages in eminent domain is not . . . available" in a case where governmental regulations exceed constitutional limits. *Id.* at 272, 598 P.2d at 28, 157 Cal. Rptr. at 375. A landowner alleging that he has been deprived of substantially all use of his land must seek invalidation of the limiting legislation under the Fifth Amendment to the United States Constitution prohibiting the "deprivat[ion] of . . . property, without due process of law" or the taking of property "for public use, without just compensation." In reaching this conclusion, Justice Richardson reaffirmed the balancing test enunciated by Justice Holmes in *Pennsylvania Coal Co.* v. *Mahon.* He suggested, however, that the Holmes' rule—"if regulation goes too far it will be recognized as a taking"—had "generated some confusion" in regard to whether damages were available as a remedy in zoning cases. He pointed out that the Supreme Court had not granted damages in that case but rather had "declared void the exercise of police power which had limited the company's right to mine its land." *Id.* at 274, 598 P.2d at 29, 157 Cal. Rptr. 376.

In fact, this Court has awarded damages in inverse condemnation only in those cases involving non-regulatory governmental action or where there has been a physical invasion of property by government. *See, e.g., United States* v. *Causby,* 328 U.S. 256 (1946); *See also,* Note, "Inverse Condemnation: Its Availability in Challenging the Validity of Zoning Ordinances, 26 Stan. L. Rev. 1439, 1442, 1443 n. 16 (1974). Cases cited by appellants supposedly permitting damages in a regulatory setting fall within this category and are therefore inapposite. Thus, in *Hurley* v. *Kincaid,* 285 U.S. 95 (1932), Congress had authorized a flood control project on the Mississippi River to improve the carrying capacity of the main channel, raise levees and provide diversion channels for overflow waters. Plaintiff's land lay within the proposed floodway channel. Justice Brandeis found that "in-

tentional, additional, occasional flooding of . . . land constitutes a taking," 285 U.S. at 103, and that, in these circumstances, a damages remedy would be appropriate. 285 U.S. at 104. *Dugan* v. *Rank,* 372 U.S. 609 (1963), *Fresno* v. *California,* 372 U.S. 627 (1963), and *United States* v. *Gerlach Live Stock Co.,* 339 U.S. 725 (1950) present analogous fact situations in which physical takings due to government projects are at issue.

The teaching of these cases is that where an actual physical invasion, or action tantamount to such invasion, is involved, then the Fifth Amendment mandates an award of "just compensation." But, where substantially all use has been denied as a result of overly restrictive regulation, invalidation of the restrictive statute restores the land to the owner. While physical takings are largely irreversible, removal of regulatory restraints which offend the Constitution permits a litigant to utilize his property as before. Due process does not and should not require more.

Moreover, as persuasively presented by the California Supreme Court, policy considerations strongly militate against a damages remedy in cases involving unconstitutional restrictions on property. Early in this century, Justice Sutherland recognized that proliferating development would require new controls by government:

> " 'The constantly increasing density of our urban populations, the multiplying forms of industry and the growing complexity of our civilization make it necessary for the state, either directly or through some public agency by its sanction, to limit individual activities to a greater extent than formerly.' " *Euclid* v. *Ambler Realty Co.,* 272 U.S. at 392 (citation omitted).

Such limitations are even more necessary today. We have either squandered our natural resources or rendered them unusable for many generations. The results of our indiscriminate use of the land have been forcefully brought to public attention by the closure of contaminated public water supply systems and the shortage of vitally needed resources. We must plan for the future through broad state and regional land use programs designed to halt deterioration of the environment and reclaim our dwindling resources.

New Jersey has, particularly in the last decade, moved vigorously to control development and preserve the land. Presently, as noted herein, the State Department of Environmental Protection regulates flood prone areas and coastal wetlands pursuant to L. 1979, ch. 359 (originally enacted as L. 1962, ch. 19 and codified at N.J.S.A. 58:16A-50 *et seq.*) and N.J.S.A. 13:9A-1 *et seq.* (The Wetlands Act). By limiting land use along the State's waterways New Jersey hopes to lessen the dangers of recurrent and increased flooding and, particularly in the Wetlands, to maintain the delicate ecological balance vital to the preservation of many forms of aquatic life. Additionally, the DEP controls development throughout the State's coastal zone under N.J.S.A. 13:19-1 *et seq.* (The Coastal Area Facility Review Act of 1973). This statute requires coastal zone planning which balances "environmental values and the legitimate need for economic growth within the coastal area" in order to develop a management strategy for New Jersey's coast. N.J.S.A. 13:19-16.

Finally, the New Jersey legislature has authorized major regional planning efforts in the Hackensack Meadowlands and in the 1,000,000 acre Pinelands Reserve located in the central and southern part of the State. See N.J. S.A. 13:17-1 *et seq.* (The Hackensack Meadowlands Re-

clamation and Development Act) and L. 1979, ch. 111 (to be codified at N.J.S.A. 13:18A-1 *et seq.* as The Pinelands Protection Act). Both the meadowlands area and the pinelands are under intense development pressures; both contain many acres of undeveloped and ecologically valuable land. The New Jersey legislature has directed the Hackensack Meadowlands Development Commission to prepare a comprehensive land use plan which insures that future development in the District will proceed in accordance with goals set by the legislature. See N.J.S.A. 13:17-1. In the pinelands, the Pinelands Commission has been designated as the agency charged with the planning function. The Commission must consider a variety of management techniques ranging from outright acquisition to regulatory restrictions on the use of land. L. 1979, c. 111, §7(d)(1). Decisions to purchase are made as a result of the planning process by individuals who have reviewed a wide range of options and have weighed available alternatives.

To permit individuals through inverse condemnation to circumvent the decisions of the planners would be to permit the destruction of this process. Public officials would be stripped of their discretionary power to chose for acquisition those lands best suited to the public purpose. *Cf. Charles* v. *Diamond,* 41 N.Y.2d 317, 332, 360 N.E.2d 1295, 1305, 392 N.Y.S.2d 594, 604 (1977). As Justice Richardson has concluded, "planners must be permitted the flexibility that their work requires." 24 Cal.3d at 274, 598 P.2d at 29-30, 157 Cal. Rptr. at 375. Moreover, as the California Supreme Court also recognized, a damages remedy would stifle innovative land use planning because of the potential drain on the State treasury.

The adverse impacts of a remedy in inverse condemnation are not counterbalanced by any commensurate bene-

fits to individual litigants. Property owners denied the beneficial use of their lands by restrictive legislation are entirely restored by invalidation of such legislation.

CONCLUSION

It is respectfully submitted that the decision of the Supreme Court of California that a landowner aggrieved by legislation which substantially limits the use of his property may seek to etablish the invalidity of such legislation but may not recover damages in inverse condemnation should be affirmed.

Respectfully submitted,

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